

## **EXHIBIT 1**

[www.chicagotribune.com/news/chi-ap-sd-phonefeud,0,1806251.story](http://www.chicagotribune.com/news/chi-ap-sd-phonefeud,0,1806251.story)

**chicagotribune.com**

## **Rural telephone battlefield: David vs. Goliath**

By CARSON WALKER

Associated Press Writer

2:00 PM CDT, July 10, 2009

SIOUX FALLS, S.D.

Three South Dakota companies that provide local telephone access in rural areas are trading lawsuits with four national long-distance companies over a practice that stems largely from more people switching to cell phones.

The local exchange carriers say the big businesses aren't paying their bills -- more than \$13 million and counting. But AT&T, Sprint, Verizon and Qwest, which pay the local carriers, accuse them of driving up costs by flooding lines with teleconference calls and other services.

That practice is known as traffic pumping, and has expanded as traditional phone companies look for ways to replace the fees they used to gather from people who had land lines.

In a nutshell, it entails local carriers working with businesses that offer free or nearly free long-distance conference calling, adult chat or similar services. Rural companies are allowed by law to charge long-distance companies higher per-minute rates for connecting their calls to the local network. The local companies then split the profits with the service providers.

Traffic pumping is part of a larger debate over the future of access fees tied to traditional phone lines as more communication moves onto broadband networks, said Rich Coit, executive director of the South Dakota Telecommunications Association.

The disputes over the practice began two years ago and have landed in federal court in Sioux Falls, as well as in other rural states such as Iowa. The Federal Communications Commission began reconsidering the rules in 2007 but has yet to adopt any changes, so the main battlefield is in the courts.

In South Dakota, the plaintiffs are Sancom Inc. of Mitchell, Northern Valley Communications LLC of Aberdeen and Splitrock Properties Inc. of Garretson. The defendants, some of which have settled or paid their bills with the local companies, are AT&T Inc., Sprint Communications Co., Verizon Business Services and Qwest Communications International Inc.

According to court documents, Sancom settled out of court with Verizon but seeks \$5.7 million from AT&T, more than \$417,000 from Sprint and more than \$108,000 from Qwest. Northern Valley's lawsuits seek \$6.2 million from AT&T and about \$885,000 from Qwest. Splitrock sued Sprint and Qwest but didn't include specific amounts.

Some of the long-distance companies have countersued.

"Sprint has been billed for millions of dollars of unlawful charges, charges that Sancom has no legal basis to collect for carrying this type of call traffic," Sprint states in its claim that seeks an injunction to end what it said are "illegal arrangements."

But Dusty Johnson, chairman of the South Dakota Public Utilities Commission, said traffic pumping technically isn't against the law.

"Starting a teleconferencing center is not illegal and charging a low price for that is not illegal. Specific facts matter a lot in cases like this," he said.

Still, Coit said the state's telecom association adopted a resolution a year ago urging its rural carrier members to avoid the practice.

It reads in part: "Carriers engaged in such arrangements hurt the interests of all rural telephone companies in South Dakota, and jeopardize the ability of rural telephone companies to properly charge other carriers for their use of local network facilities."

Johnson said local carriers have lost access fee revenue "as cell phones have cannibalized minutes from land line providers."

In November, AT&T and the Rural Independent Competitive Alliance submitted to the FCC a compromise on rules that it said "addresses the problems created by the few carriers gaming the system but does not unduly impact those carriers competing in good faith."

One proposals is to outlaw revenue sharing agreements between local exchange carriers and businesses that offer teleconference or other services.

Copyright 2009 Associated Press. All rights reserved. This material may not be published, broadcast, rewritten, or redistributed.

## **EXHIBIT 2**



# PUBLIC NOTICE

**Federal Communications Commission**  
**445 12<sup>th</sup> St., S.W.**  
**Washington, D.C. 20554**

**News Media Information 202 / 418-0500**  
**Internet: <http://www.fcc.gov>**  
**TTY: 1-888-835-5322**

**DA 09-1493**  
**Released: July 1, 2009**

## **PROTESTED TARIFF TRANSMITTALS**

### **ACTION TAKEN**

#### **Report No. WCB/Pricing File No. 09-02**

Pursuant to authority delegated under sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, the Pricing Policy Division of the Wireline Competition Bureau has reviewed the petitions to reject or to suspend and investigate the tariff transmittals listed in this Report, as well as subsequent tariff revisions to two of the challenged tariffs.<sup>1</sup>

Based on this review, we conclude that the parties filing petitions against the tariff transmittals listed in this Report have not presented compelling arguments that these transmittals are so patently unlawful as to require rejection. Similarly, we conclude the parties have not presented issues regarding the transmittals that raise significant questions of lawfulness that require investigation of the tariff transmittals listed in this Report.

Accordingly, the petitions to reject or suspend and investigate the following tariff transmittals are denied, and the transmittals will, or have, become effective on the date specified below. Applications for review and petitions for reconsideration of this decision may be filed within 30 days from the date of this Public Notice in accordance with sections 1.115 and 1.106 of the Commission's rules, 47 C.F.R. §§ 1.115, 1.106.

Additional information about a particular tariff transmittal may be obtained from the contact person at (202) 418-1540.

<b>CARRIER(s):</b>	<b>ICORE, Northwest Iowa Telephone Company</b> <b>Geneseo Communications, Inc.</b> <b>National Exchange Carrier Association, Inc.</b>
<b>TRANSMITTAL(s):</b>	<b>Transmittal No. 91, Tariff F.C.C. No. 2</b> <b>Transmittal No. 13, Tariff F.C.C. No. 1</b> <b>Transmittal No. 1245, Tariff F.C.C. No. 5</b>
<b>SUBJECT:</b>	<b>2009 Annual Access Tariff Filings</b>

---

<sup>1</sup> See ICORE, Northwest Iowa Telephone Company, Transmittal No. 92, Tariff F.C.C. No. 2; Geneseo Telephone Company, Transmittal No. 14, Tariff F.C.C. No. 1.

**PETITIONER(s):** AT&T Corp.  
Sprint Nextel Corporation

**EFFECTIVE DATE:** July 1, 2009

**CONTACT:** Pamela Arluk at (202) 418-1540

\*\*\*\*\*

-FCC-

## **EXHIBIT 3**

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

---

In the Matter of )

July 1, 2009 )

Annual Access Charge Tariff Filings )

ICORE )

Tariff F.C.C. No. 2 )

Northwest Iowa Telephone Company )

Geneseo Communications, Inc. )

Tariff F.C.C. No. 1 )

Union Telephone Company )

Tariff F.C.C. No. 2 )

---

WCP/Pricing 09-02

Transmittal No. 91

Transmittal No. 13

Transmittal No. 78

**PETITION OF AT&T CORP. TO SUSPEND AND INVESTIGATE**

David L. Lawson  
Christopher T. Shenk  
Sidley Austin LLP  
1501 K St., N.W.  
Washington, D.C. 20005  
(202) 736-8000

Gary L. Phillips  
M. Robert Sutherland  
AT&T Inc.  
1120 20th Street, N.W.  
Washington, D.C. 20036  
(202) 457-2057

*Attorney's for AT&T Corp.*

June 23, 2009

## TABLE OF CONTENTS

INTRODUCTION AND SUMMARY .....	2
I. THE COMMISSION SHOULD SUSPEND AND INVESTIGATE THE RATES OF NORTHWEST IOWA AND GENESEO BECAUSE THEY ARE ENGAGED IN TRAFFIC STIMULATION SCHEMES THAT RESULT IN VASTLY INFLATED RATES. ....	4
II. THE COMMISSION SHOULD SUSPEND AND INVESTIGATE THE TARIFF OF GENESEO FOR THE ADDITIONAL REASON THAT IT HAS FAILED TO REDUCE ITS LOCAL SWITCHING REVENUE REQUIREMENT TO REFLECT UNIVERSAL SERVICE SUPPORT AMOUNTS IT RECEIVED IN 2007 AND ITS RATES ARE INFLATED BY SO-CALLED "WRITE-OFFS" .....	10
III. UNION TELEPHONE COMPANY HAS OVERSTATED ITS PROPOSED TANDEM SWITCHING TRANSPORT RATE. ....	12
CONCLUSION.....	14

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

	)	
In the Matter of	)	
	)	
July 1, 2009	)	WCP/Pricing 09-02
Annual Access Charge Tariff Filings	)	
	)	
ICORE	)	Transmittal No. 91
Tariff F.C.C. No. 2	)	
Northwest Iowa Telephone Company	)	
	)	
Geneseo Communications, Inc.	)	Transmittal No. 13
Tariff F.C.C. No. 1	)	
	)	
Verizon Telephone Companies	)	Transmittal No. 1022
Tariff No. 1	)	
	)	
Embarq Local Operating Companies	)	Transmittal No. 72
Tariff F.C.C. No. 1	)	
	)	

**PETITION OF AT&T CORP. TO SUSPEND AND INVESTIGATE**

Pursuant to Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773, and the Commission's Order, DA 09-683, released Mar. 26, 2009,<sup>1</sup> AT&T Corp. ("AT&T") respectfully requests that the Commission suspend for one day, investigate and issue an accounting order for the interstate access tariff filed by above captioned local exchange carriers ("LECs").<sup>2</sup>

---

<sup>1</sup> Order, *July 1, 2009 Annual Access Charge Filings*, WCB/Pricing File No. 09-02, DA 09-683 (rel. Mar. 26, 2009) (setting procedures and filing dates for the 2009 annual access charge filings).

<sup>2</sup> See ICORE, Northwest Iowa Telephone Company, Transmittal No. 91, Tariff No. 2 (filed June 16, 2009); Geneseo Communications Inc., Transmittal No. 13, Tariff No. 1 (filed June 16, 2009); Union Telephone Company. Transmittal No. 78, Tariff F.C.C. No. 2 (filed June 16, 2009).

## **INTRODUCTION AND SUMMARY**

Prompt Commission action is required to address significantly inflated and unlawful rates contained in the tariffs of three rate-of-return carriers, Northwest, Geneseo and Union. As described below, Northwest and Geneseo are engaged in traffic stimulation schemes. In addition, both Geneseo and Union have made fundamental errors in computing their rates. There is unquestionably a high probability that the tariffs will be found unlawful after investigation, that those unreasonable rates will not be corrected in a subsequent filing, and that suspension, investigation and entry of an appropriate accounting order are necessary to protect the public interest and prevent irreparable harm to ratepayers.

During the past several months, Northwest Iowa's and Geneseo's monthly interstate switched access volumes have been trending sharply upwards, and they now exceed historical levels by as much as 9 times. AT&T's anti-fraud department has placed test calls to the telephone numbers associated with the highest traffic volumes for these LECs, and AT&T has confirmed that these telephone numbers are used in connection with well-known traffic stimulation schemes. As a result of these traffic stimulation schemes, these LECs' rates are substantially inflated and will result in returns that far exceed the Commission's prescribed 11.25% rate of return. In 2007, the Commission suspended and investigated, and ordered an accounting of the tariffs filed by several LECs engaged in such traffic stimulation schemes, and it should do so again here.

Moreover, the fact that LECs continue to engage in traffic stimulation schemes emphasizes the critical importance that the Commission adopt rules in its pending rulemaking proceeding (WC Docket No. 07-135) to prohibit such conduct. Absent such rules, AT&T and other ratepayers incur very substantial costs in uncovering such schemes and then challenging

them on a piecemeal basis in tariff interventions and by filing complaints with the Commission and federal courts.

The tariff filed by Geneseo should also be suspended, investigated and set for accounting for independent reasons. Geneseo received significant support from the universal service fund in 2007, and the Commission's rules require that Geneseo reduce its revenue requirement by such amounts. Although Geneseo received such support in 2007 and 2008, it reduced its revenue requirement for the 2009/2010 tariff period by only a portion of those amounts. As a result of this error, the rates in Geneseo's tariff are inflated by \$185,508 on an industry-wide basis. Geneseo has also inappropriately included its total local switching support in its revenue requirement which further inflates its rates. In addition, Geneseo has inflated its revenue requirement for local switching by so-called "write-offs" that AT&T understands reflect amounts from Geneseo's 2007 and 2008 bills that are currently the subject of billing disputes. Such amounts are not properly included in Geneseo's 2009/2010 rates. If Geneseo is allowed to inflate its 2009/2010 rates with such "write-offs" Geneseo would then either recover amounts to which it is not entitled (if it does not prevail in those billing disputes) or double recover amounts it has already collected (if it prevails in those billing disputes).

Union Telephone is not engaged in traffic pumping. However, Union has made fundamental errors in its tariff filing that inflate its tandem switched transport rates by about \$1.5 million. Indeed, as explained below, although Union reports that its Total Transport Revenue Requirement is \$696,441, the rates it has computed will result in earnings of about \$2.2 million for that rate element.

**I. THE COMMISSION SHOULD SUSPEND AND INVESTIGATE THE RATES OF NORTHWEST IOWA AND GENESEO BECAUSE THEY ARE ENGAGED IN TRAFFIC STIMULATION SCHEMES THAT RESULT IN VASTLY INFLATED RATES.**

Section 204 of the Communications Act (47 U.S.C. § 204) grants the Commission broad authority, on its own initiative or upon request, to suspend and investigate tariff filings that propose rates that are of questionable lawfulness. As the Commission has recognized, suspension and investigation of tariffs is an especially essential element of the core mandate to ensure just and reasonable rates where highly suspect tariffs that raise substantial questions of lawfulness are filed on a streamlined basis. *See, e.g., July 1, 2004, Annual Access Charge Tariff Filings*, 19 FCC Rcd 23877, ¶ 7 (2004) (“NECA Order”) (“When tariffs . . . are filed pursuant to the ‘deemed lawful’ provisions of the statute . . . it is incumbent upon us to suspend and investigate the tariff filing if it may reflect unjust and unreasonable rates”).

“To enforce [Section 201(b)], the Commission has prescribed an authorized rate of return of 11.25% for rate of return carriers.”<sup>3</sup> The rate of return prescription applies to all LECs that file tariffs under 47 C.F.R. § 61.39. As explained by the Commission, rates filed in tariffs under 47 C.F.R. § 61.39 “remain subject to the rate of return” prescription established by the Commission.<sup>4</sup> And, it is settled that “[v]iolations of rate of return prescriptions are *per se*

---

<sup>3</sup> *NECA Order* ¶ 8.

<sup>4</sup> *Regulation of Small Tel. Cos.*, 2 FCC Rcd. 3811, ¶ 14 (1987) (“*Small Carrier Tariff Order*”); *see also id.* ¶ 18 n.27 (small LECs “electing to use” § 61.39 to compute rates “would compute rate[s] based on the target [*i.e.*, prescribed] rate of return”); *id.* ¶ 7 (stating that § 61.39 “should not permit or provide incentives for small companies to file access tariffs producing excessive returns”); *id.* ¶ 18 (“we emphasize that these carriers remain subject to the rate-of-return prescription in effect at the time the rates are effective. Therefore, if the actual return of an exempted carrier [*i.e.*, exempted from the *automatic* refund obligations that then applied to other rate-of-return regulated LECs] exceeds the authorized return, the Commission reserves the right, at its discretion, to enforce its rate of return prescription by appropriate action, included the imposition of refunds”); 47 C.F.R. § 61.39(c) (“rates must be calculated based on the [LEC’s] (continued...)”).

violations of the duty to charge only ‘just and reasonable’ rates.’”<sup>5</sup> As the D.C. Circuit has explained, “[t]he idea of a rate prescription under section 205 is that the agency has proclaimed that a certain situation – here a return in excess of 10% – is unlawful and shall not occur.”<sup>6</sup>

Accordingly, the Commission has consistently suspended and investigated tariffs when it appears that a LEC’s tariffed rate may result in returns that substantially exceed the rate-of-return prescription. Most relevant here, the Commission has held that traffic stimulation schemes are precisely the type of conduct that raises serious questions as to whether a LEC’s tariff is lawful and that tariffs filed by LECs engaged in such schemes should be suspended and investigation.<sup>7</sup>

Traffic stimulation schemes work as follows: (1) the LEC enters into revenue sharing arrangements with communications service providers offering (usually “free”) chat and other domestic and international calling services, which results in millions of calls between non-residents of the rural communities the LEC serves being routed through the LEC’s exchange; (2) the LEC files an individual tariff under Rule 61.39 that establishes high terminating access charges based on the false pretense that its traffic volume will continue at historically low levels; and (3) the LEC bills its access customers terminating access charges for these calls, generating

---

(...continued)

prescribed rate of return applicable to the period during which the rates are effective”).

<sup>5</sup> *Virgin Islands Tel.*, 444 F.3d at 669-70. See also *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 127 S. Ct. 1513, 1519-20 (2007) (permitting Commission to “treat a violation of the [rate-of-return] prescription as a *per se* violation of the requirement of the Communications Act that a common carrier maintain ‘just and reasonable’ rates”).

<sup>6</sup> *NETCO v. FCC*, 826 F.2d 1101, 1106 (D.C. Cir. 1987); see also *id.* (“Certainly carriers cannot intentionally try to violate an outstanding prescription, but that does not mean that they may achieve through inadvertence what they are forbidden from doing by design”).

<sup>7</sup> See Order, July 1, 2007, Annual Access Charge Tariff Filings, 22 FCC Rcd. 11619 (2007) (“2007 Suspension Order”); Order Designating Issues For Investigation, *Investigating of Certain* (continued...)

revenues and returns that exceed the LEC's cost of service and authorized return by orders of magnitude.

In its *2007 Suspension Order*, the Commission held that these schemes “raise substantial questions of lawfulness that warrant investigation,”<sup>8</sup> and it designated three critical issues for investigation. First, the Commission set for investigation the question of “whether the cost of any direct or indirect payments, sharing of access revenues or other forms of compensation to the provider of an access stimulation service, or the cost of directly providing the access stimulation activity, is properly included in the revenue requirements used to develop switched access rates.” *2007 Designation Order* ¶ 13. The Commission explained that “it is unclear what these costs have to do with the provision of exchange access service” and that “[i]ncluding such costs as a cost of exchange access may be an unreasonable practices that violates section 201(b) and the prudent expenditure standard.” *Id.*

Second, the Commission set for investigation “whether the rates filed [by LECs engaged in traffic pumping] will remain just and reasonable if demand increases dramatically.” *2007 Designation Order* ¶ 15. As the Commission recognized, LECs that file tariffs pursuant to section 61.39 of the Commission's rules (47 C.F.R. § 61.39), compute rates by essentially dividing their projected revenue requirement (costs plus the Commission prescribed 11.25% rate-of-return) by their projected demand (*i.e.*, traffic volumes). The projected demand figures are typically based on the LEC's historical demand, because for ordinary LECs demand tends to be steady over time. *Id.* But for a LEC that is engaged in traffic pumping, its actual prospective

---

(...continued)

*2007 Access Tariffs*, 22 FCC Rcd. 16109 (2007) (“*2007 Traffic Stimulation Order*”).

<sup>8</sup> *2007 Suspension Order* ¶ 3.

demand will be substantially higher than any projections based on historical demand. As a result, the LEC's rates will be set too high, and the LEC will earn returns that far exceed the permissible 11.25%. As the Commission has explained, LECs that engage in traffic stimulation activities "can generate increased revenues that likely would result in rates that are unjust and unreasonable." *Id.*

Third, the Commission set for investigation the question of "how the Commission should ensure that it has an opportunity review the rates when a specified increase in local switching demand is reached." *2007 Designation Order* ¶ 19. Where a LEC is engaged in a traffic stimulation scheme, "at some point, an increase in local switching demand will result in switched access rates that are no longer just and reasonable." *Id.*

The tariffs at issue here present an even clearer case for suspension and investigation than those at issue in the 2007 suspension and investigation orders. In 2007, the Commission suspended and investigated the tariffs of several LECs based on strong evidence that the rates in those LECs tariffs would produce returns that exceed the Commission-prescribed 11.25% level because those LECs were *likely* to engage in traffic stimulation schemes, even though the LECs had not yet initiated such schemes.<sup>9</sup> Here, by contrast, Northwest Iowa and Geneseo already engage in traffic stimulation schemes, and it is clear the rates in their July 1, 2009 tariffs will produce returns that substantially exceed the 11.25% prescribed level.

Northwest Iowa and Geneseo are LECs that have filed tariffs pursuant to 47 C.F.R. § 61.39. In July 2007, Northwest Iowa and Geneseo filed a new tariff with the Commission that

---

<sup>9</sup> *2007 Suspension Order* ¶ 32.

contained significantly higher rates based on low traffic volumes in 2005 and 2006. Those rates were effective on July 1, 2007.

Soon after obtaining those substantial rate increases, the traffic volumes for Northwest Iowa and Geneseo began to surge to levels well above those on which their rates were based. Calls by AT&T's anti-fraud department called to several of the Northwest Iowa and Geneseo telephone numbers that were generating the largest volumes of traffic confirmed that those telephone numbers were associated with the type of free and low cost calling services used to generate enormous amounts of traffic pursuant to a traffic stimulation scheme, such as free conference and chat lines.

In their July 1, 2009 tariff filings, Northwest Iowa and Geneseo filed rates for 2009/2010 tariff period based on their average monthly traffic volumes for 2007 and 2008. These rates are lower than Northwest Iowa's and Geneseo's prior rates because they reflect the higher average monthly volumes for 2007 and 2008. However, their average volumes for 2007 and 2008 vastly understate the traffic volumes they will obtain in the 2009/2010 tariff period, because the 2007/2008 average volumes include the much lower traffic volumes from 2007 before Northwest Iowa and Geneseo had fully implemented their traffic pumping schemes. Indeed, the average monthly local switching traffic volumes for 2007 and 2008 that these LECs used to develop their 2009/2010 rates were 2.9 million (Northwest Iowa) and 3.9 million (Geneseo). But according to the data supplied in their July 1, 2009 tariff filings, their actual local switching volumes had already exceeded those levels by December 2008 (for Northwest Iowa) and January (for Geneseo), *see* Exhibit A, and according to AT&T's billing data, by March 2009, their local

switching volumes were even higher still.<sup>10</sup> There is no reason to believe that Northwest Iowa's local switching and tandem transport volumes will decrease in the future. On the contrary, historical trends show that such volumes will continue their dramatic upward trends in 2009 and 2010.

In short, the rates in the July 1, 2009 tariffs of Northwest Iowa and Geneseo for the 2009/2010 tariff period assume local switching and tandem transport volumes that are a small fraction of the actual volumes they are experiencing. Consequently, their actual traffic volumes for the 2009/2010 tariff period will clearly far exceed the volumes on which the rates are based, and will thus result in returns that substantially exceed the Commission-prescribed 11.25% level.

Because the Northwest Iowa and Geneseo tariffs raise substantial questions of lawfulness, the Commission should – as it did in 2007 when confronted with similar facts – suspend and investigate, and set for accounting, the tariffs of Northwest Iowa and Geneseo.

In 2007, the Commission permitted the LECs whose rates were suspended to avoid investigation and prescription by including language in their tariff that required them to file new tariffs if their traffic volumes in any month exceeded 100% of the volume in the same month in the previous year. That “safe harbor” does not provide adequate protection here. Unlike the LECs that were subject to the 2007 suspension and investigation, these LECs have already begun their traffic pumping schemes. Consequently, their year-ago traffic volumes are already inflated by traffic stimulation volumes, which provides them vast headroom to continue to increase their traffic volumes without triggering the tariff re-filing requirement. For example, as noted,

---

<sup>10</sup> Similarly, the average tandem transport volumes for Northwest Iowa and Geneseo for 2007 and 2008 were 2.9 million minutes and 3.9 million minutes, respectively, and AT&T's billing data show that its actual minutes have far exceeded those levels for both LECs since January (continued...)

Northwest Iowa's local switching traffic volumes for March 2008 are approximately 10 million minutes. Under such a safe harbor Northwest Iowa could continue its traffic pumping scheme by increasing volumes to nearly 20 million minutes by next March and avoid having to file corrected tariffs. Thus, here, immediate further rate reductions are necessary to ensure that the 2009/2010 rates reflect current (traffic stimulation inflated) volumes.

The proper approach here is for the Commission to suspend and investigate, and order an accounting of, the Northwest Iowa and Geneseo tariffs. As part of that investigation, the Commission should determine appropriate demand projections for these LECs, and require them to set rates for the 2009/2010 tariff period based on those projections. AT&T supports, for example, resetting these LECs' based on historical traffic volumes for the six month from January, 2008 through June 2009. In addition, after the traffic sensitive rates for Northwest Iowa and Geneseo have been reset, both of these LECs should be required to include a provision in their tariff that requires them to file updated tariffs within 60 days if their demand increases by more than 100% compared to the demand levels on which their previous rates were set.

**II. THE COMMISSION SHOULD SUSPEND AND INVESTIGATE THE TARIFF OF GENESEO FOR THE ADDITIONAL REASON THAT IT HAS FAILED TO REDUCE ITS LOCAL SWITCHING REVENUE REQUIREMENT TO REFLECT UNIVERSAL SERVICE SUPPORT AMOUNTS IT RECEIVED IN 2007 AND ITS RATES ARE INFLATED BY SO-CALLED "WRITE-OFFS".**

In addition, Geneseo's tariff contains three clear errors. First, Geneseo, has included universal service support amounts that it received in 2007 and 2008 in its 2008/2009 revenue requirement for local switching, which is not permitted by the Commission's formula for computing the revenue requirement.

---

(...continued)

(Northwest Iowa) and February (Geneseo) of 2008. See Exhibit B.

Second, Geneseo compounded this error by failing to remove all of the universal service support it received in 2007 and 2008 from its local switching revenue requirement. The Commission's rules require all carriers that receive such support to reduce their local switching revenue requirements in subsequent tariff period (here the 2009/2010 period) by the amount of local switching support they receive.<sup>11</sup> Geneseo received \$489,852 of local switching support in 2007 and \$618,276 in 2008, and Geneseo properly reduced its local switching revenue requirement to reflect these amounts. However, as a result of a true-up by the Universal Service Administrative Company ("USAC"), which administers the universal service support mechanism, Geneseo received an *additional* \$185,508 in universal service support for 2007. Although USAC's reports show that Geneseo received this additional support,<sup>12</sup> Geneseo did not reduce its local switching revenue requirement by this amount, as required by the Commission's rules.

The average schedule switched basic settlement formulas produced \$1,885,539<sup>13</sup> for the 2007 & 2008 settlement period. With the removal of the correct local switching support amount of \$1,293,636 and the removal of line port costs of \$246,158<sup>14</sup> and the addition of SS7 costs of \$100,224<sup>15</sup>, the residual amount remaining for its local switching rate setting revenue

---

<sup>11</sup> Part 69.106(b)

<sup>12</sup> Third Qtr 2009 USAC Filing HC22 - Local Switching Support by State by Study Area - 2007 True-Up - 3Q2009.

<sup>13</sup> Geneseo Telephone Company, Transmittal No. 13, Filed June 16, 2009. Cost support workpapers provided upon request, Exhibit A-Rate Development.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

requirement is \$445,969 for the two year period. This compares to Geneseo's residual local switching revenue requirement of \$2,491,777.<sup>16</sup> These calculations are shown in Exhibit C.

Third, Geneseo Telephone Company has included in its revenue requirement \$752,172 of what it calls "write-offs" that it attributes to attributed to AT&T and other interexchange carriers. It is AT&T's understanding that these "write-offs" are amounts that Geneseo has either had to refund to interexchange carriers as a result of billing errors or that are currently the subject of disputed bills. At least to the extent those "write-offs" relate to Geneseo's disputes with AT&T, they are clearly inappropriate. AT&T's billing dispute with Geneseo relates to DS1 lines ordered by AT&T, for which Geneseo billed as 24 DS0 lines rather than a DS1 line, resulting in overbilling of about \$300,000. Geneseo had no basis to bill AT&T for those amounts in the first place, and it certainly has no legitimate basis for seeking to recover those amounts through increases in its 2009/2010 tariffed rates.

The Commission should thus suspend and investigate Geneseo's July 1, 2009 tariffs for these independent reasons.

### **III. UNION TELEPHONE COMPANY HAS OVERSTATED ITS PROPOSED TANDEM SWITCHING TRANSPORT RATE.**

Union reports that its Total Transport Revenue Requirement is \$696,441.<sup>17</sup> However, its Total Tandem Switched Transport rate (\$.018524) will result in TTR recovery of \$2,235,092.<sup>18</sup>

---

<sup>16</sup> *Id.*

<sup>17</sup> Union Telephone 2009 Annual Access Filing, Transmittal No. 78, "Development of Tandem Switched Transport Rates" Line 11. The source of this amount is the average of Union's Part 69 Cost Study, Study Years 2007 and 2008, line 36, columns Interstate Transport Transmission and Tandem Switching.

<sup>18</sup> Union Telephone 2009 Annual Access Filing, Transmittal No. 78, "Development of Tandem Switched Transport Rates" Line 18.

Union's Total Tandem Switched Transport rate therefore produces overearnings of more than \$1.5 million. These overearnings are caused by two significant errors in Union's tariff (these errors and corresponding corrections are shown in Exhibit D).

First, Union incorrectly includes its DS1 Multiplexing rate as part of the Revenue per Circuit portion in Part A of its calculation.<sup>19</sup> Removing the DS1 Multiplexing rate from the calculation, reduces its DS1 Revenue per Circuit from \$404.29 to \$124.24.<sup>20</sup> Correcting this error reduces Union's Tandem Switched Transport Rate from \$.002315 to \$.000711.<sup>21</sup>

Second, Union has used the incorrect minutes of use ("MOUs") to compute its "Host Remote per MOU Additive." In its Development of Tandem Switched Transport Rates workpaper, Union shows its Host Remote Revenue Requirement to be \$441,842 and Union divides this amount by Host Remote MOUs of 28,143,826.<sup>22</sup> This calculation results in a Host Remote MOU Additive of \$.015699 per MOU.<sup>23</sup> Union then adds this \$.015699 to the Tandem

---

<sup>19</sup> Union Telephone 2009 Annual Access Filing, Transmittal No. 78, "Development of Tandem Switched Transport Rates" Line 1. Section 69.111(g) of the Commission's rules specifically states that the multiplexing charge should be excluded from the tandem switching charge calculation: "Beginning January 1, 2000, the tandem switching charge imposed pursuant to paragraph (a)(2)(ii) of this section shall be set to recover the entire interstate tandem switching revenue requirement, including that portion formerly recovered through the interconnection charge recovered in §§ 69.124, 69.153, and 69.155, and excluding multiplexer and dedicated port costs recovered in accordance with paragraph (l) of this section."

<sup>20</sup> Union Telephone 2009 Annual Access Filing, Transmittal No. 78, "Calculation of Direct Trunk Transport Revenues" Line 1 Special Access CMT Rate \$121.81 + Special Access CMF Rate \$2.43 = \$124.24.

<sup>21</sup> See Exhibit D, Line 5.

<sup>22</sup> Union Telephone 2009 Annual Access Filing, Transmittal No. 78, "Development of Tandem Switched Transport Rates" Line 6 and Line 7.

<sup>23</sup> Union Telephone 2009 Annual Access Filing, Transmittal No. 78, "Development of Tandem Switched Transport Rates" Line 9.

Switched Transport Rate and Tandem Switched Transport Rate per MOU to arrive at a final Total Tandem Switching Transport rate of \$.018524.<sup>24</sup>

Although Union has computed a Host to Remote per MOU additive based on only its Host to Remote MOUs, it has included this \$.015699 additive in its Total Tandem Switching Transport rate of \$.018524 which will be billed to *all* Tandem Switching MOUs. Since Union's Host to Remote additive is billed to all Tandem Switching MOUs through the Total Tandem Switching rate, Union must compute this additive using all Tandem Switching MOUs, not just the Host to Remote MOUs.

Correcting this error by calculating Union's Host to Remote additive using total Tandem Switching MOUs results in a per minute rate of \$.003662, not \$.015699. Union's total Tandem Switching Transport rate after making these two corrections should be \$.004712, not \$.018524.<sup>25</sup>

### CONCLUSION

For the reasons stated above, the Commission should suspend for one day and investigate the tariffs filed by the above-captioned LEC tariffs and impose an accounting order.

Respectfully submitted,

AT&T Corp.

/s/ M. Robert Sutherland

Gary L. Phillips

M. Robert Sutherland

AT&T Inc.

David L. Lawson  
Christopher T. Shenk  
Sidley Austin LLP

<sup>24</sup> Union Telephone 2009 Annual Access Filing, Transmittal No. 78, "Development of Tandem Switched Transport Rates" Line 18.

<sup>25</sup> Exhibit D, Line 18.

1501 K St., N.W.  
Washington, D.C. 20005  
(202) 736-8000

---

1120 20th Street, N.W.  
Washington, D.C. 20036  
(202) 457-2057

*Attorney's for AT&T Corp.*

***Please Send and Fax Replies To:***

Safir Rammah  
Director-Finance, AT&T  
Room B-J16.21  
3033 Chain Bridge Road  
Oakton, VA, 22185  
Phone: 703-691-6186  
Fax: 908-234-4529

June 23, 2009

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 23<sup>rd</sup> day of June 2008, I caused true and correct copies of the foregoing Petition of AT&T Corp. To Suspend And Investigate to be served on all parties as shown on the attached Service List.

Dated: June 23, 2009  
Washington, D.C.

/s/ Christopher T. Shenk

## SERVICE LIST

Raj Kannan  
Pricing Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 5-A221  
Washington, D.C. 20554  
[Raj.Kannan@fcc.gov](mailto:Raj.Kannan@fcc.gov)  
(3 paper copies and 1 e-mail copy)

Pamela Arluk  
Chief, Pricing Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 5-A225  
Washington, D.C. 20554  
[Pamela.Arluk@fcc.gov](mailto:Pamela.Arluk@fcc.gov)  
(1 paper copy and 1 e-mail copy)

Best Copy and Printing, Inc.  
Portals II  
445 12<sup>th</sup> Street, SW, Room CY-B402  
Washington, D.C. 20554  
[fcc@bcpiweb.com](mailto:fcc@bcpiweb.com)  
(1 email copy)

Scott Rubins  
General Manager – Geneseo Telephone  
Company  
111 East First St.  
Geneseo, IL 61254  
Tel. (309) 944-2103  
Fax. (309) 944-4406  
(by facsimile and by First Class U.S. mail)

Tina Bobbyn  
Senior Vice President  
ICORE, Inc.  
326 South Second Street  
Emmaus, PA 18049  
Tel. (610) 928-3944  
Fax. (610) 928-5036  
(by facsimile and by First Class U.S. mail)

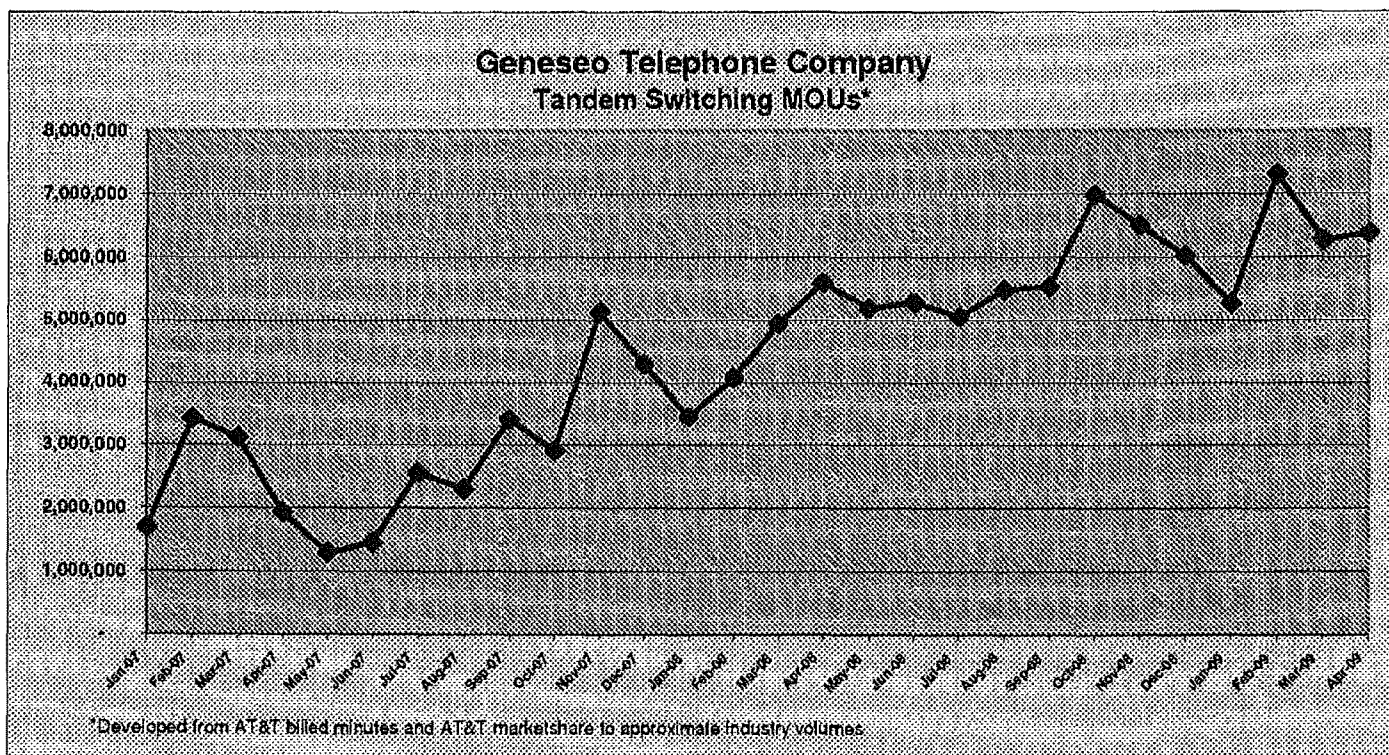
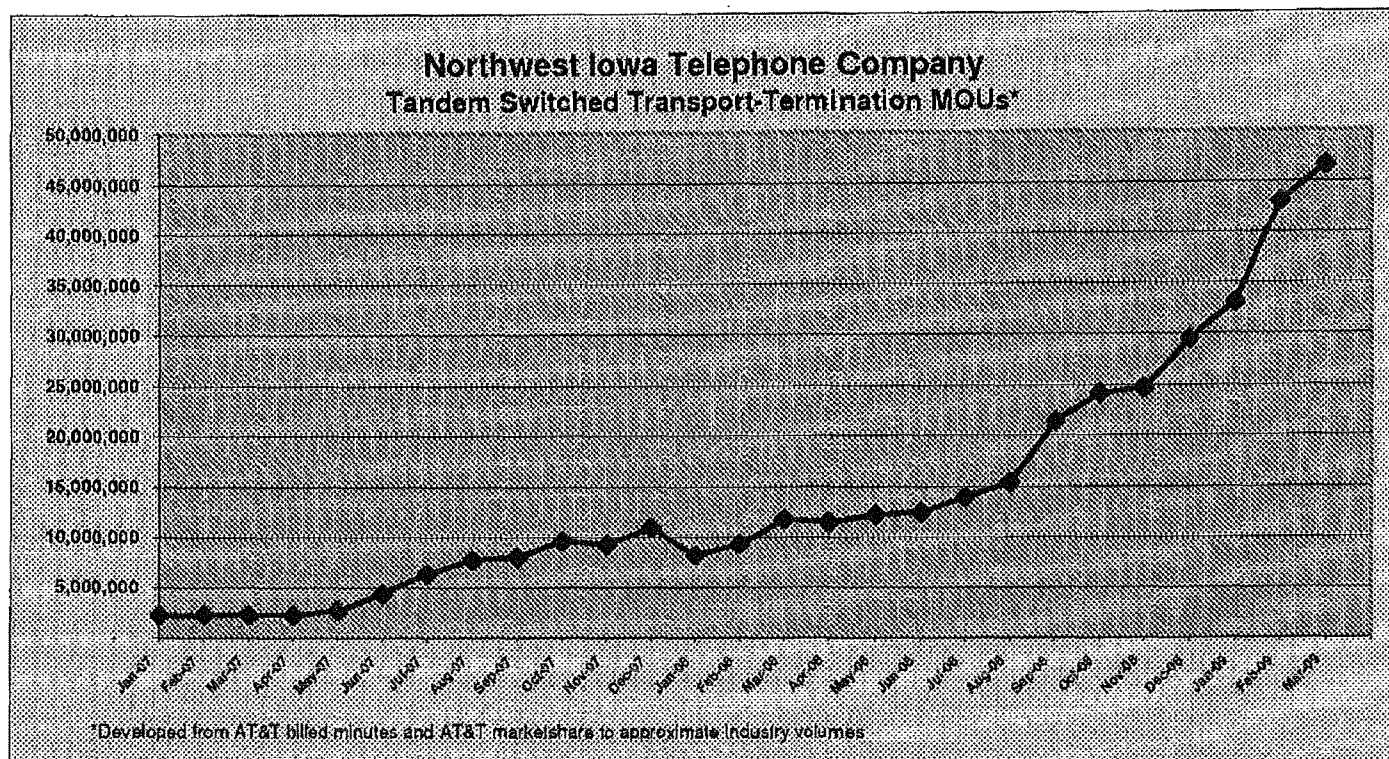
Gerard J. Duffy  
Blooston, Mordkofsky, dickens, Duffy &  
Pendergast, LLP  
2120 L Street, N.W.  
Washington, D.C. 20337  
Tel. (202) 828-5528  
Fax. (202) 828-5568  
*Attorney For Union Telephone*

**Local Switching Minutes**  
**Northwest Iowa Telephone Company**  
**Geneseo Telephone Company**  
**As Filed June 16, 2009**

**EXHIBIT A**

<b>Month</b>	<b>NW Iowa Local Switching MOUs</b>	<b>Geneseo Local Switching MOUs</b>
Jan-07	931,787	2,566,423
Feb-07	866,848	2,439,887
Mar-07	990,549	1,736,256
Apr-07	1,276,720	1,226,626
May-07	1,607,293	1,639,708
Jun-07	1,688,944	2,705,454
Jul-07	1,711,537	1,981,785
Aug-07	1,966,019	2,646,684
Sep-07	1,890,023	2,247,139
Oct-07	2,220,241	3,521,963
Nov-07	2,564,832	2,980,731
Dec-07	2,721,947	3,019,551
Jan-08	3,446,975	3,465,272
Feb-08	3,194,450	4,104,988
Mar-08	3,404,424	4,588,308
Apr-08	3,383,016	4,325,485
May-08	3,709,090	4,396,362
Jun-08	3,729,362	4,813,076
Jul-08	4,527,654	5,328,636
Aug-08	4,698,152	5,219,195
Sep-08	4,384,313	6,100,078
Oct-08	5,275,652	8,910,313
Nov-08	5,305,534	7,061,066
Dec-08	5,818,683	6,839,686
<b>Average Monthly MOUs</b>	<b>2,971,419</b>	<b>3,911,028</b>

Source:  
 ICORE Transmittal No. 91  
 Geneseo Transmittal No. 13  
 Cost support workpapers were provided upon request



**Geneseo Telephone Company  
Local Switching Rate Development**

**EXHIBIT C**

	<b>2007 &amp; 2008</b>	
	<b>As Calculated</b>	<b>As Filed</b>
<b>Switched Basic Settlement</b>	\$1,885,539	\$3,846,063
<b>Local Swtg Support</b>	\$1,293,636	\$1,108,128
<b>less Local Swtg Support</b>	\$591,903	\$2,737,935
<b>Line Port</b>	\$246,158	\$246,158
<b>less Line Port</b>	\$345,745	\$2,491,777
<b>SS7 Full*</b>	\$100,224	
<b>Add SS7 Full</b>	\$445,969	\$2,491,777
<b>Local Switching Demand</b>	90,067,618	90,067,619
<b>Local Switching Rate</b>	\$0.00495	\$0.02767

\*Note: SS7 Costs included in Geneseo's starting local switching revenue requirement

Source: Transmittal No. 13 (workpapers were provided upon request)  
Exhibit A-Rate Development  
Average Schedule Formulas

**Union Telephone Company**  
**Development of Tandem Switched Transport Rates**  
**July 1, 2009 Interstate Access Tariff Filing**

Exhibit D

Line	Description	Source	Union as Filed	AT&T Corrected
1	Revenue Per Circuit	Special Access	\$404.29	<b>\$124.24</b>
2	Voice Grade Equivalent	Given	\$24.00	\$24.00
3	Revenue Per Circuit	Calculation (Ln1/Ln2)	\$16.85	\$5.18
4	Minutes Per Circuit Per Month	Special Study	7,277	7,277
5	Tandem Switched Transport (TST) Rate - Part A	$Ln5=Ln3/Ln4$	<u>0.002315</u>	<u>\$0.000711</u>
6	Host Remote Revenue Requirement	Host Remote Workpaper	\$441,842	\$441,842
7	Host to Remote MOUs	Demand	28,143,826	<b>120,655,986</b>
8	Host to SWC MOUs	Demand	0	0
9	Host Remote Additive - Part B	$Ln6/(Ln7+Ln8)$	<u>\$0.015699</u>	<u>\$0.003662</u>
10	TST Rate Part A + Part B	$Ln5+Ln9$	<u>\$0.018014</u>	<u>\$0.004373</u>
11	Total (Average) Transport Revenue Requirement	Part 69	\$696,441	\$696,441
12	Revenue From TST Rate	$Ln10*(Ln7+Ln8)$	\$506,983	\$527,673
13	Revenue From Direct Trunks	DTT Revenue Workpaper	\$98,836	\$98,836
14	Revenue From 800 Data Base Queries	800 Data Base Query Revenue Workpaper	\$29,067	\$29,067
15	Residual Transport Revenue Requirement	$Ln11-Ln12-Ln13-Ln14$	\$61,555	\$40,865
16	Transport Minutes of Use	Demand	120,655,986	120,655,986
17	TST Rate Part C	$Ln15/Ln16$	<u>\$0.000510</u>	<u>\$0.000339</u>
18	Total TST Rate Part A + Part B + Part C	$Ln10+Ln17$	<u><b>\$0.018524</b></u>	<u><b>\$0.004712</b></u>

## **EXHIBIT 4**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
July 1, 2009	)	WCB/Pricing 09-02
Annual Access Charge Tariff Filings	)	
	)	
ICORE	)	Transmittal No. 91
Tariff F.C.C. No. 2	)	
Northwest Iowa Telephone Company	)	
_____	)	

**REPLY OF NORTHWEST IOWA TELEPHONE COMPANY TO  
PETITION OF AT&T CORP. TO SUSPEND AND INVESTIGATE**

James U. Troup  
VENABLE LLP  
575 7<sup>th</sup> Street, N.W.  
Washington, D.C. 20004-1604  
Tel: (202) 344-4000  
Fax: (202) 344-8300

*Attorney for  
Northwest Iowa Telephone Company*

June 26, 2009

**TABLE OF CONTENTS**

I.	AT&T's PETITION IS AN IMPROPER COLLATERAL ATTACK UPON SECTION 61.39 OF THE COMMISSION'S RULES.....	1
II.	AT&T'S PETITION FAILS TO SATISFY THE STANDARD FOR SUSPENDING THE RATE REDUCTIONS PROPOSED BY NORTHWEST IOWA TELEPHONE.....	6
III.	CONCLUSION.....	9

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
July 1, 2009	)	WCB/Pricing 09-02
Annual Access Charge Tariff Filings	)	
	)	
ICORE	)	Transmittal No. 91
Tariff F.C.C. No. 2	)	
Northwest Iowa Telephone Company	)	
_____	)	

**REPLY OF NORTHWEST IOWA TELEPHONE COMPANY TO  
PETITION OF AT&T CORP. TO SUSPEND AND INVESTIGATE**

Northwest Iowa Telephone Company ("Northwest Iowa Telephone"), pursuant to Section 1.773(b) of the Commission's rules and the Commission's March 26, 2009 Order,<sup>1</sup> hereby submits its Reply to the petitions to suspend and investigate filed by AT&T Corp. ("Petition"). For the reasons set forth below, the Petition should be denied.

**I. AT&T's PETITION IS AN IMPROPER COLLATERAL ATTACK UPON  
SECTION 61.39 OF THE COMMISSION'S RULES.**

Northwest Iowa Telephone left the NECA pool and filed its tariff under Section 61.39(b)(2) for traffic-sensitive elements to become effective in July, 1997.<sup>2</sup> Since then Northwest Iowa Telephone has never returned to the NECA traffic-sensitive pool, and every two years Northwest Iowa Telephone has filed revisions to its Section 61.39(b)(2) tariff. As required by Section 61.39(b)(2), when traffic volume during the historical period has declined, Northwest Iowa Telephone's traffic-sensitive rates have increased,

<sup>1</sup> 47 C.F.R. § 1.773(b); *In the Matter of July 1, 200, Annual Access Charge Tariff Filings, Order*, DA 09-683, 24 FCC Rcd 3664 (Mar. 26, 2009).

<sup>2</sup> AT&T erroneously alleges that Northwest Iowa Telephone filed its first Section 61.39 tariff in July, 2007. Petition at 7.

and when traffic volume during the historical period has increased, Northwest Iowa Telephone's traffic-sensitive rates have decreased. Inherent in Section 61.39 is a process that self-corrects rates without the inaccuracies associated with projections, which has ensured that Northwest Iowa Telephone's rates have remained just and reasonable over the last 12 years.

On June 16, 2009, Northwest Iowa Telephone filed significant reductions in its traffic-sensitive rates that were calculated in full compliance with the Commission's prescribed rules and regulations. While Northwest Iowa Telephone proposed rate reductions to go into effect on July 1, 2009, NECA proposed rate increases. For example, Northwest Iowa proposed a premium rate for end office local switching that is 43.56% less than the same rate proposed by NECA for its lowest rate band.<sup>3</sup> It has been the Commission's policy to not suspend or otherwise interfere with rate decreases to avoid depriving customers of "the benefits of significantly lower rates."<sup>4</sup> With the exception of AT&T, no other interexchange carrier has raised concerns regarding the rate reductions proposed by Northwest Iowa Telephone. Consistent with the Commission's long-standing policy, customers will benefit and the public interest will be served by allowing the reductions in Northwest Iowa Telephone's rates to become effective on July 1, 2009 without suspension or investigation.

This year, Northwest Iowa Telephone has proposed rate reductions because there was an increase in traffic volume during the 2007 and 2008 calendar years. This increase

---

<sup>3</sup> In contrast to NECA's proposed end office local switching rate for rate band 1 of \$0.009913, Northwest Iowa Telephone proposed an end office local switching rate of only \$0.005595.

<sup>4</sup> *New York Telephone Company Tariff F.C.C. No. 41, Order*, 2 FCC Rcd. 6729 ¶ 5(1987); *Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking*, 4 FCC Rcd 2873 ¶ 387 (1989); *July 1, 2004, Annual Access Charge Tariff Filings, Order on Reconsideration*, 19 FCC Rcd 14616 (2004).

in traffic is attributable to legitimate conference calling services which have helped Northwest Iowa Telephone expand the productive use of its rural telephone plant in a reasonable and lawful manner. Northwest Iowa Telephone has no guarantee or control over whether the volume of conference calls will decrease or increase in the future. Despite AT&T's use of inflammatory and inappropriate rhetoric, such as "traffic pumping", conference calls are a lawful means of stimulating the rural economy and certainly provide no basis for a rate suspension especially when such additional traffic results in rate reductions, as Northwest Iowa Telephone has proposed.

AT&T's Petition asks the Commission to take actions contrary to the Commission's rules. AT&T has failed to demonstrate any exceptional circumstances relating to this year's proposed rate reductions that warrant deviation from Section 61.39. AT&T does not suggest that Northwest Iowa Telephone violated Section 61.39, but instead seeks modifications to Section 61.39 that should only be undertaken in a rulemaking if the existing rules are not resulting in just and reasonable rates, as they are. First, AT&T asks the Commission to require Northwest Iowa Telephone to use demand projections to calculate its rates even though Section 61.39 prohibits the use of demand projections and the Commission has found such demand projections to be an inaccurate method of setting rates. If the volume of conference calls is expected to fall, then the use of projections could cause a rate increase, rather than the rate reductions that Northwest Iowa Telephone has proposed.

Second, AT&T asks the Commission to require Northwest Iowa Telephone to use a historical period consisting of only 6 months even though Section 61.39 requires a historical period that includes the two previous calendar years. AT&T's attempted

manipulation of the historical period in the Commission's rules violates the principle of rate neutrality that Section 61.39 was designed to achieve. Section 61.39 does not permit Northwest Iowa Telephone to select a different historical period than that prescribed in the rules in order to obtain a rate increase anymore than it allows AT&T to engage in such manipulation in order to obtain a benefit for AT&T.

Third, AT&T proposed a limit on Northwest Iowa Telephone's traffic growth that is nowhere contained in the Commission's rules. AT&T wants to discriminately and arbitrarily apply this new regulation to Northwest Iowa Telephone but not to larger carriers like AT&T. Such a limitation on demand growth is entirely unnecessary because Section 61.39(b)(2) will cause further reductions in Northwest Iowa Telephone's rates if demand increases, just as it has with this year's annual tariff filing.

It would be inappropriate to punish Northwest Iowa Telephone with an investigation for doing what the Commission's rules required in lieu of engaging in the unlawful demand forecasts and arbitrary historical period manipulations sought by AT&T. Northwest Iowa Telephone's tariff rates were calculated in full compliance with Section 61.39(b)(2) of the Commission's rules based on the average schedule formulas and historical demand for the 2007 and 2008 calendar years. Such compliance with the Commission's rules is by definition a reasonable practice. The use of historical demand data to calculate rates also cannot be considered unlawful because that is precisely what is required by Section 61.39(b)(2), and the Commission has expressly prohibited the use of projections.

In adopting Section 61.39(b)(2), the Commission determined that tariff rates based on actual historical traffic, rather than projections, would result in more efficient

rates.<sup>5</sup> AT&T, instead, mounts an inappropriate collateral attack on those Commission conclusions in an effort to inject the use of demand projections in evaluating Section 61.39(b)(2) rates. The Commission also recognized that an average schedule company's rates calculated pursuant to Section 61.39(b)(2) may be less than the NECA pooled rates.<sup>6</sup> As noted above, Northwest Iowa Telephone has proposed to reduce its local switching rate to a level that is far below the local switching rate proposed by NECA for the pool.

AT&T now seeks to set rates based on future demand in complete contravention of the Section 61.39(b)(2) requirement to set rates on the basis of only historical demand. The fact is that Section 61.39(b)(2) prohibited Northwest Iowa Telephone from calculating its rates on the basis of demand projections.<sup>7</sup>

In previously rejecting this forecasting approach, the Commission has concluded that the use of historical data is far less likely to lead to excessive earnings than the use of forecasts.

A carrier such as AT&T for example, which has excessive earnings in one period as a result of faulty forecasting, may also have excessive earnings in the next period if its new forecasts are also defective. The process is not self-correcting in such ratemaking.<sup>8</sup>

Calculating Section 61.39(b)(2) tariff rates on the basis of a projected number of calls not only violates the Commission's regulations, but, had Northwest Iowa Telephone done so,

---

<sup>5</sup> *In the Matter of Regulation of Small Telephone Companies, Report and Order*, 2 FCC Rcd 3811 ¶ 12 (released June 29, 1987) ("*Historical Tariff Order*").

<sup>6</sup> *Id.* ¶ 25.

<sup>7</sup> *Historical Tariff Order* ¶¶ 15-16 (rejecting the use of projected data "to account for known and measurable changes expected to occur in the upcoming rate period").

<sup>8</sup> *Id.* at n. 28.

would have caused it to engage in the type of speculative forecasting that Section 61.39(b)(2) was designed to avoid.

AT&T's Petition itself is a prime example of AT&T's reckless speculation and faulty forecasting. Exhibit B to AT&T's petition provides a graph of traffic volumes that is complete fiction and blatantly false. The correct traffic volumes for interstate access service that Northwest Iowa Telephone provided to all interexchange carriers during the same months are shown in Exhibit A attached hereto. AT&T contends that Northwest Iowa Telephone's traffic volume was 10 million minutes in March, 2008, when it was actually a little more than 3.4 million. AT&T's speculative forecasting is obviously a poor substitute for self-correcting rates through the actual historical demand data required by Section 61.39(b)(2).

As demonstrated by the rate reductions that Northwest Iowa Telephone has proposed, Section 61.39(b)(2) is working as originally intended by self-correcting rates over time. The Commission's decision to reject demand projections remains sound, as such forecasting can lead to excessive rates that are not self-correcting and earnings in excess of the authorized rate of return. The Commission should therefore reject this attempt by AT&T to add demand forecasts to the Section 61.39(b)(2) tariff regime and allow Northwest Iowa Telephone's rate reductions to become effective without suspension or investigation.

**II. AT&T'S PETITION FAILS TO SATISFY THE STANDARD FOR SUSPENDING THE RATE REDUCTIONS PROPOSED BY NORTHWEST IOWA TELEPHONE.**

Reductions in Section 61.39(b)(2) tariff rates, such as is the subject here, are prima facie lawful if average schedule information was provided to interexchange

carriers upon reasonable request. Northwest Iowa Telephone provided the average schedule information to AT&T that it requested, and therefore Northwest Iowa Telephone's proposed rate reductions are prima facie lawful.

A prima facie lawful tariff filing may only be suspended if AT&T, as the party with the burden of proof, meets all of the following standards:

- (A) That there is a high probability the tariff would be found unlawful after investigation;
- (B) That any unreasonable rate would not be corrected in a subsequent filing;
- (C) That irreparable injury will result if the tariff filing is not suspended; and
- (D) That the suspension would not otherwise be contrary to the public interest.<sup>9</sup>

This stringent four part test establishes a "no-suspension zone" for tariffs like that upheld in *Advanced Micro Devices*, which requires a person challenging a rate within the zone to establish "extraordinary circumstances" to justify suspension.<sup>10</sup>

The Petition filed by AT&T fails to satisfy even one of these criteria, and certainly not the entire stringent four part test. AT&T has not met its burden of proving that "extraordinary circumstances" exist, and therefore the Petition should be denied.

AT&T has not come even close to proving the first criteria. By self-correcting Northwest Iowa Telephone's rates over twelve years, Section 61.39(b)(2) has required Northwest Iowa Telephone to charge reasonable rates and prevented Northwest Iowa Telephone from earning in excess of the authorized rate of return. Given Northwest Iowa

---

<sup>9</sup> 47 C.F.R. § 1.773(a)(1)(iii).

<sup>10</sup> *Policy and Rules Concerning Rates for Dominant Carriers, Further Notice of Proposed Rulemaking*, 3 FCC Rcd 3195, 3303 ¶ 201 (1988), citing *Advanced Micro Devices v. Civil Aeronautics Board*, 742 F.2d 1520, 1533 (DC Cir. 1984). "In large measure this standard parallels the one courts use in determining whether to issue stays or preliminary injunctions." *Advanced Micro Devices*, 742 F.2d at 1533, citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (DC Cir. 1958).

Telephone's consistent compliance with Section 61.39(b)(2) for more than a decade and no evidence that Section 61.39(b)(2) does not work effectively to self-correct rates, it is highly unlikely that an investigation would find anything unlawful about Northwest Iowa Telephone's proposed rate reductions.

The Commission described the self-correcting nature of Section 61.39(b)(2) tariff rates as follows:

Although rates might theoretically be inaccurate because of changed circumstances, they should also be self-correcting and thus rate neutral over time because current actuals would be used in subsequent periods to set rates. Carriers using this ratemaking process thus should neither gain nor lose revenue in the long run as a result of using actual historical data.<sup>11</sup>

Section 61.39(b)(2) is working as originally intended, and the rates charged by Northwest Iowa Telephone will be self-correcting over time.

Section 69.3(a) of the Commission's rules requires every carrier operating under the Section 61.39(b)(2) tariff regime to revise their rates at least every two years. Northwest Iowa Telephone's Section 61.39(b)(2) rates have declined as conference call traffic has increased. Exhibit B attached hereto illustrates the extensive decline in Northwest Iowa Telephone's rates since 1999. As increases in historical demand are reflected in Section 61.39(b)(2) ratemaking, Northwest Iowa Telephone's interstate access rates will continue to decline far below the rates for the NECA pool. Thus, AT&T has not satisfied the second criteria, as Northwest Iowa Telephone's rates will self-correct in subsequent tariff filings just as they have done for more than a decade.

With respect to the third criteria, AT&T has failed to demonstrate how AT&T would be irreparably injured if the rate reductions are not suspended. Increases in

---

<sup>11</sup> *Historical Tariff Order* ¶ 12.

demand, if any occur, after the rates become effective will cause Northwest Iowa Telephone's rates to decrease in subsequent filings, as originally intended by the historical lag and self-correcting nature of the Section 61.39(b)(2) tariff filing regime. Should Northwest Iowa Telephone experience an increase in future demand, any theoretical inaccuracies in its rates will self-correct when Northwest Iowa Telephone revises its rates, as required by Sections 61.39(b)(2) and 69.3(a) of the Commission's rules. Such a subsequent correction means any alleged injury is "reparable", not "irreparable". In addition, AT&T will collect additional revenue from consumers using its long distance services if demand increases.

With respect to the fourth criteria, suspension of the proposed rate reductions would be contrary to the public interest. Customers would suffer from interference with the proposed rate reductions. A suspension and investigation would create uncertainty that would injure both the public and Northwest Iowa Telephone. Until such an investigation is complete, customers will not know whether the rate reductions proposed by Northwest Iowa Telephone will be reversed and replaced with higher rates. An investigation will also cause uncertainty as to what funds are available now for Northwest Iowa Telephone to upgrade its facilities to provide broadband services, and thereby stimulate the economy in its rural service area and increase jobs.

### **III. CONCLUSION.**

For the foregoing reasons, the Commission should deny AT&T's Petition. The Petition does not satisfy the stringent four part test for suspending the prima facie lawful rate reductions proposed by Northwest Iowa Telephone. Those tariff rate reductions were calculated in full compliance with Section 61.39(b)(2) and are just and reasonable.

Section 61.39(b)(2) has proven that the use of actual historical demand is a more effective methodology of preventing excessive earnings than the use of projections. Furthermore, AT&T will not be irreparably harmed because Section 61.39(b)(2) requires rates to self-correct over time. Suspension and investigation is also contrary to the public interest in reducing rates for customers, keeping funds available for broadband construction and promoting rural economic stimulus.

Respectfully submitted,

/s/ James U. Troup  
James U. Troup  
VENABLE LLP  
575 7<sup>th</sup> Street, N.W.  
Washington, D.C. 20004-1604  
Tel: (202) 344-4000  
Fax: (202) 344-8300

Attorney for  
Northwest Iowa Telephone Company

June 26, 2009

### CERTIFICATE OF SERVICE

I, Monica Gibson-Moore, a legal assistant in the law firm of Venable LLP, do hereby certify that on this 26<sup>th</sup> day of June, 2009, copies of the foregoing Reply of Northwest Iowa Telephone Company to Petition of AT&T Corp. to Suspend and Investigate were served on the following parties:

Raj Kannan  
Pricing Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554  
raj.kannan@fcc.gov  
(3 paper copies and 1 e-mail copy)

David L. Lawson  
Christopher T. Shenk  
Sidley Austin LLP  
1501 K Street, N.W.  
Washington, DC 20005  
Tel: (202) 736-8000  
Fax: (202) 736-8711  
*(via facsimile and first-class mail)*

Pamela Arluk  
Chief, Pricing Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554  
pamela.arluk@fcc.gov  
(1 paper copy and 1 e-mail copy)

Safir Rammah  
Director-Finance  
AT&T  
Room B-J16.21  
3303 Chain Bridge Road  
Oakton, VA 22185  
Tel: (703) 691-6186  
Fax: (908) 234-4529  
*(via facsimile and first-class mail)*

Best Copy and Printing, Inc.  
Portals II  
445 12<sup>th</sup> Street, SW  
Room CY-B402  
Washington, DC 20554  
fcc@bcpiweb.com  
(1 e-mail copy)

Scott Rubins  
General Manager  
Geneseo Telephone Company  
111 East First Street  
Geneseo, IL 61254  
Tel: (309) 944-2103  
Fax: (309) 944-4406  
*(via facsimile and first-class mail)*

Tina Bobbyn  
Senior Vice President  
ICORE, Inc.  
326 South Second Street  
Emmaus, PA 18094  
Tel: (610) 928-3944  
Fax: (610) 928-5036  
*(via facsimile and first-class mail)*

Gerard J. Duffy  
Blooston, Mordkofsky, Dickens, Duffy  
& Pendergast, LLP  
2120 L Street, N.W.  
Washington, DC 20337  
Tel: (202) 828-5528  
Fax: (202) 828-5568  
*(via facsimile and first-class mail)*

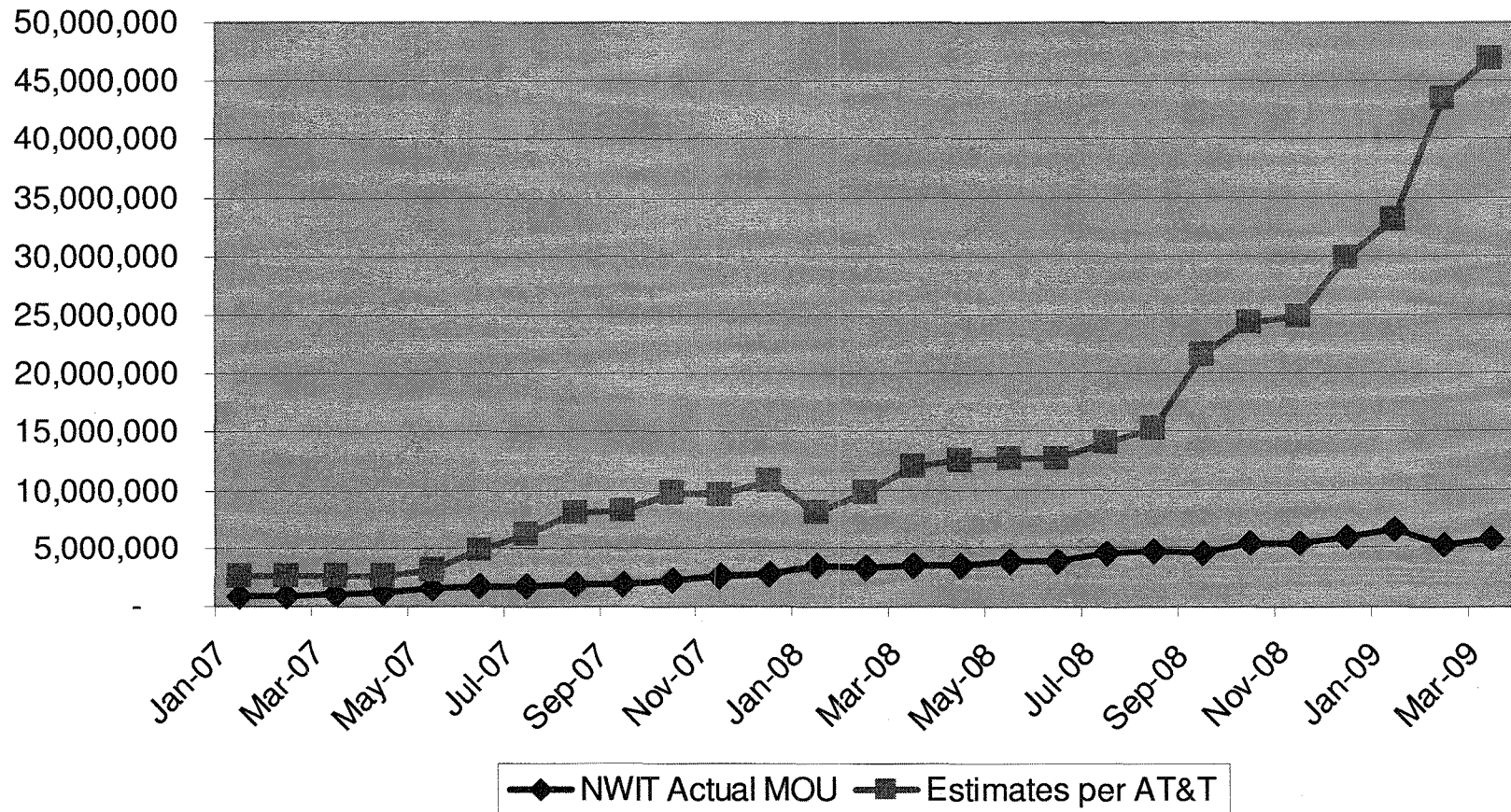
Gary L. Phillips  
M. Robert Sutherland  
AT&T Inc.  
1120 20<sup>th</sup> Street, N.W.  
Washington, DC 20036  
(via first-class mail)

/s/ Monica Gibson-Moore  
Monica Gibson-Moore

## **EXHIBIT A**

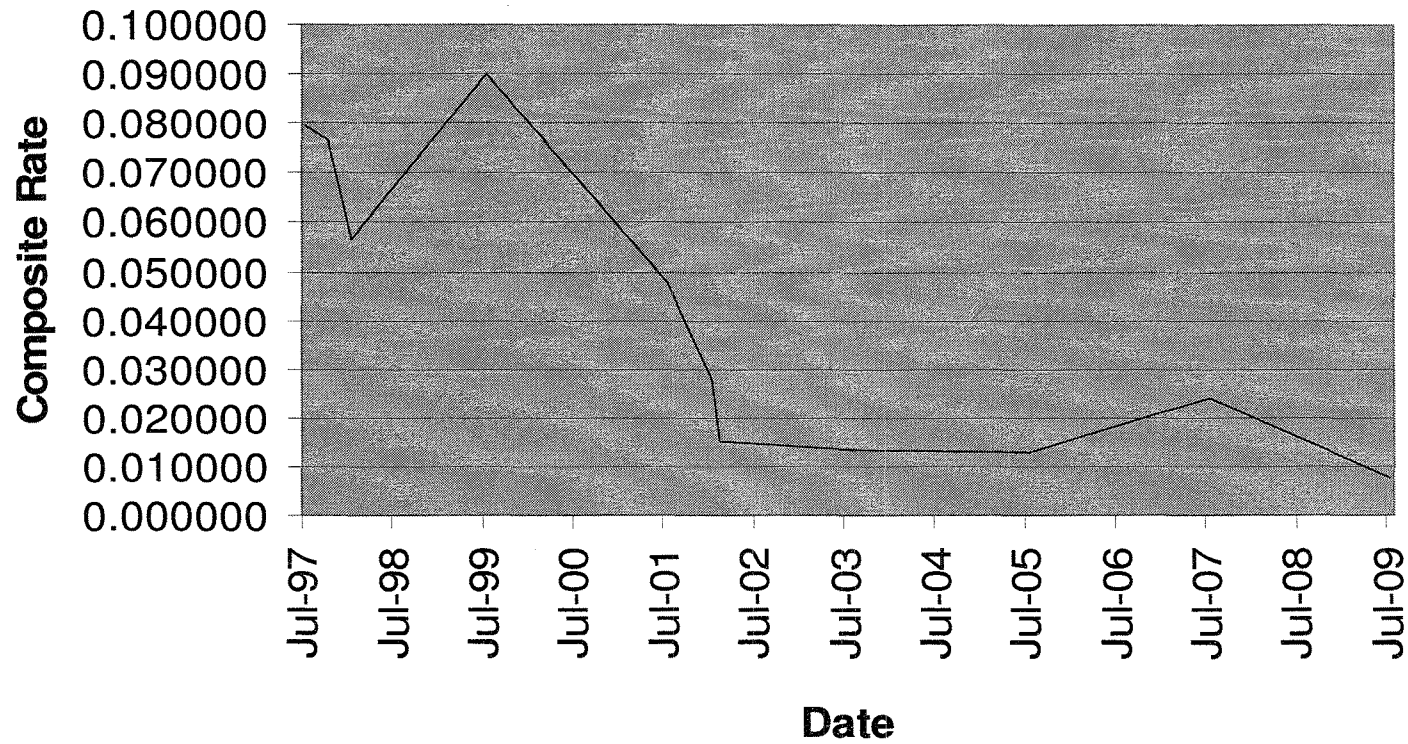
# Northwest Iowa Telephone Company

## Switched Interstate MOU's



## **EXHIBIT B**

## Northwest Iowa Tel Co. Interstate Access Rates



Jul-97	0.079540
Oct-97	0.076517
Jan-98	0.056631
Jul-99	0.089947
Jul-01	0.047809
Jan-02	0.027964
Feb-02	0.015293
Jul-03	0.013445
Jul-05	0.012920
Jul-07	0.024135
Jul-09	0.007580

## **EXHIBIT 5**

Before the  
Federal Communications Commission  
Washington, D.C. 20554

North County Communications Corp.,

Complainant,

v.

MetroPCS California, LLC,

Defendant.

File No. EB-06-MD-007

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 30, 2009**

**Released: March 30, 2009**

**By the Chief, Enforcement Bureau:**

**I. INTRODUCTION**

1. In this Memorandum Opinion and Order, we dismiss in part and otherwise deny the claims alleged in the formal complaint<sup>1</sup> that North County Communications Corp. ("North County") filed against MetroPCS California, LLC ("MetroPCS") under section 208 of the Communications Act of 1934, as amended ("Act").<sup>2</sup> In short, the Complaint alleges that MetroPCS violated sections 201(b), 202(a), and 251(b)(5) of the Act,<sup>3</sup> and sections 20.11, 51.301, and 51.715 of the Commission's rules,<sup>4</sup> by (a) failing to pay North County for the transport and termination of intrastate traffic originated by MetroPCS; (b) failing to establish an interim reciprocal compensation arrangement with North County for the transport and termination of intrastate traffic originated by MetroPCS; and (c) failing to enter into a final interconnection agreement with North County for the transport and termination of intrastate traffic originated by MetroPCS.<sup>5</sup>

2. As explained below, we dismiss Count I of the Complaint without prejudice because North County should first obtain from the California Public Utilities Commission ("PUC") a determination of a reasonable compensation rate. We deny Counts II and IV of the Complaint because the Commission rules upon which those Counts are predicated apply only to incumbent local exchange carriers ("incumbent LECs"), and neither North County nor MetroPCS is an incumbent LEC. Finally, we deny Counts III and V of the Complaint because the record does not demonstrate a violation of either section 201(b) or section 202(a) of the Act.

<sup>1</sup> Second Amended Complaint, File No. EB-06-MD-007 (filed Aug. 24, 2006) ("Complaint").

<sup>2</sup> 47 U.S.C. § 208.

<sup>3</sup> 47 U.S.C. §§ 201(b), 202(a), and 251(b)(5).

<sup>4</sup> 47 C.F.R. §§ 20.11, 51.301, and 51.715.

<sup>5</sup> See, e.g., Complaint at 15-16, ¶¶ 64-68 (Count I); 16-19, ¶¶ 69-76 (Count II); 19-20, ¶¶ 77-86 (Count III); 20-22, ¶¶ 87-94 (Count IV); and 22-23, ¶¶ 95-103 (Count V).

## II. BACKGROUND

3. North County is a licensed competitive local exchange carrier (“CLEC”) that provides switched and non-switched local exchange, exchange access, and other telecommunications services in California.<sup>6</sup> Most, if not all, of North County’s end user customers are either chat-line providers or telemarketers.<sup>7</sup>

4. MetroPCS is a Commercial Mobile Radio Service (“CMRS”) carrier that provides wireless communications services in California.<sup>8</sup> MetroPCS is indirectly interconnected with North County in California through the switching facilities of other local exchange carriers (“LECs”).<sup>9</sup> MetroPCS does not have a written interconnection agreement with North County.<sup>10</sup>

5. All of the traffic exchanged between North County and MetroPCS at issue here is jurisdictionally intraMTA<sup>11</sup> and intrastate (hereinafter “intrastate” traffic).<sup>12</sup> Moreover, all of the traffic

<sup>6</sup> See, e.g., Third Further Supplemental Joint Statement, File No. EB-06-MD-007 (filed Jan. 8, 2007) (“Joint Statement”) at 12, ¶ 64.

<sup>7</sup> See, e.g., Joint Statement at 12, ¶ 61; Response to Commission’s February 2, 2007 Letter, File No. EB-06-MD-007 (filed Feb. 9, 2007) (“Feb. 9 Stipulation”) at 1; Initial Brief of North County Communications Corp., File No. EB-06-MD-007 (filed Sept. 28, 2007) (“North County Initial Brief”) at 29-30. For purposes of this Order, a “chat-line provider” offers a service that “combine[s] multiple incoming calls that happen to arrive in a common time frame, but are otherwise unscheduled by the parties and may result in connecting callers who are unknown to one another.” Feb. 9 Stipulation at 1.

<sup>8</sup> See, e.g., Joint Statement at 1, ¶ 2; MetroPCS California, LLC’s Amended Answer to North County’s Second Amended Complaint, File No. EB-06-MD-007 (filed Oct. 19, 2006) (“Amended Answer”) at 4, ¶ 6. See 47 C.F.R. § 20.3 (defining “commercial mobile radio service”).

<sup>9</sup> See, e.g., Joint Statement at 3, ¶ 15.

<sup>10</sup> See, e.g., Joint Statement at 3, ¶ 18.

<sup>11</sup> See, e.g., Complaint at 2-3, ¶¶ 8-10; Legal Brief of MetroPCS California, LLC, File No. EB-06-MD-007 (filed Sept. 28, 2007) (“MetroPCS Initial Brief”) at 3-7 (describing the dispute as pertaining to reciprocal compensation involving “local termination”); 47 C.F.R. § 24.202(a) (defining “MTA”). MetroPCS initially asserted that some of the traffic may not be intraMTA, because the jurisdictional nature of MetroPCS’ calls to North County’s chat lines may depend not only on the location of the MetroPCS caller and of the North County chat line, but also on the location of all the other callers with whom the MetroPCS caller is chatting. See, e.g., Amended Answer at 5-7, ¶¶ 8-10; Legal Analysis in Support of MetroPCS California, LLC’s Amended Answer (“MetroPCS Legal Analysis”) at 6-11. Later, however, MetroPCS essentially withdrew that assertion and limited its argument to a contention that a chat line call with multiple participants does not constitute “telecommunications” under section 3(43) of the Act, 47 U.S.C. § 153(43). Reply of MetroPCS California, LLC to North County Communications Corp.’s Brief in Opposition to the Legal Brief of MetroPCS California, LLC, File No. EB-06-MD-007 (filed Oct. 26, 2007) at 12. We address that argument at ¶ 13, *infra*.

<sup>12</sup> Although the Complaint refers to the traffic only as intraMTA, the record is replete with grounds for concluding that the traffic is also intrastate, *i.e.*, to and from end users within California. See, e.g., Complaint at 1-2 (naming MetroPCS California as the defendant, and referring exclusively to MetroPCS’ service territory in California); Complaint at 3 (relying heavily on North County’s California tariff); Complaint at 4 (relying heavily on a traffic termination rate adopted by the California PUC); Complaint at 12, Joint Statement at 12, ¶ 63 (both relying heavily on local termination rates paid by MetroPCS to two other California LECs); Complaint Exhibit G, ¶ 5 (declaring that North County terminated calls from “MetroPCS” end users within the intraMTA that includes San Francisco and Sacramento); Complaint Exhibit 1 (copies of North County invoices to MetroPCS for “IntraLATA Call Termination”); Complaint Exhibit 16 (describing the traffic at issue as “all intraLATA traffic” within California); Complaint Exhibits 11 and 18 (draft North County/MetroPCS interconnection agreement which describes the traffic covered by the agreement as “local traffic”). Perhaps most telling, none of the parties’ pleadings describes the traffic as interstate, including even the six briefs they filed after Commission staff (i) directed the parties to address the question of “[w]hich is the proper and preferable forum (in terms of jurisdiction, comity, *forum non conveniens*, or otherwise) for resolution of this dispute, the FCC or the California PUC?”, and (ii) listed for the parties several

(continued ...)

exchanged between the parties is in-bound to North County from MetroPCS.<sup>13</sup> That is because North County's chat line provider customers generate no outbound calls, and, according to North County, legal restrictions preclude its telemarketer customers from calling wireless phones.<sup>14</sup>

6. Despite the absence of a written interconnection agreement with MetroPCS, North County began billing MetroPCS for the termination of intrastate traffic sometime in 2003.<sup>15</sup> MetroPCS has not paid North County any amount of money for the traffic terminated by North County.<sup>16</sup> In MetroPCS' view, a default "bill-and-keep" arrangement exists, whereby neither party pays the other for traffic termination.<sup>17</sup> Between August 2005 and approximately June 2006, North County and MetroPCS attempted to negotiate a written interconnection agreement, without success.<sup>18</sup>

7. Upon reaching an impasse in its negotiations with MetroPCS regarding a written interconnection agreement, North County filed its Complaint. Count I of the Complaint alleges that MetroPCS is violating rule 20.11(b)<sup>19</sup> by failing to pay North County for terminating traffic originated on MetroPCS' network.<sup>20</sup> Count II of the Complaint alleges that MetroPCS is violating section 251(b)(5) of the Act<sup>21</sup> and rule 51.301<sup>22</sup> by failing to negotiate and execute a written interconnection agreement with North County in good faith.<sup>23</sup> Counts III and V of the Complaint allege that MetroPCS is violating

---

**(Continued from previous page)**

Commission orders declining to preempt state jurisdiction to set rates charged by LECs to terminate traffic from CMRS providers. Letter from Alex Starr, Chief, EB, MDRD, FCC, to Michael B. Hazzard, Counsel for North County, and Carl W. Northrop, Counsel for MetroPCS (dated Aug. 10, 2007) ("Briefing Order"). In fact, MetroPCS concedes that the Commission orders cited by Commission staff in the Briefing Order permit the Commission to allow states to establish rates for the type of traffic at issue here. MetroPCS Initial Brief at 21.

<sup>13</sup> See, e.g., Joint Statement at 12, ¶ 61; North County Initial Brief at 30; Amended Answer, Exhibit E, Declaration of Dena Bishop in Support of MetroPCS California, LLC's Answer at 7, ¶ 35; Amended Answer, Exhibit 27 at 3; MetroPCS Legal Analysis at 6-7.

<sup>14</sup> See, e.g., North County Initial Brief at 29-30; MetroPCS Initial Brief at 2. See also 47 U.S.C. § 227(b)(1)(A)(iii); *Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991*, Report and Order, 18 FCC Red 14014 (2003) (subsequent history omitted); 47 C.F.R. § 64.1200(a)(1)(iii).

<sup>15</sup> See, e.g., Joint Statement at 3, ¶ 16. For a period of time prior to May 2006, North County billed MetroPCS \$0.004 per minute of use and \$0.007 per call set-up for intrastate traffic termination. See, e.g., Joint Statement at 2, ¶ 6. In May 2006, North County changed its intrastate termination rate and began billing MetroPCS \$0.011 per minute of use. See, e.g., Joint Statement at 2, ¶ 7.

<sup>16</sup> See, e.g., Joint Statement at 3, ¶ 19; 13, ¶ 65.

<sup>17</sup> See, e.g., Amended Answer at 9, ¶ 16, 12, ¶ 21; MetroPCS Legal Analysis at 28; MetroPCS Initial Brief at 5-6. See also Joint Statement at 2, ¶ 9.

<sup>18</sup> See, e.g., Joint Statement at 2, ¶ 8; 3, ¶¶ 13, 18; 4-6, ¶¶ 23-25, 27, 29-35; 7-11, ¶¶ 36-59.

<sup>19</sup> See, e.g., 47 C.F.R. § 20.11(b) (providing that "[l]ocal exchange carriers and commercial mobile radio service providers shall comply with principles of mutual compensation"); 47 C.F.R. § 20.11(b)(2) (providing that "[a] commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider").

<sup>20</sup> See, e.g., Complaint at 15-16, ¶¶ 64-68.

<sup>21</sup> 47 U.S.C. § 251(b)(5) (providing that "[e]ach local exchange carrier has ... [t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications").

<sup>22</sup> 47 C.F.R. § 51.301 (providing, in pertinent part, that "[a]n incumbent LEC shall negotiate in good faith the terms and conditions of agreements to fulfill the duties established by sections 251(b) and (c) of the Act").

<sup>23</sup> See, e.g., Complaint at 16-19, ¶¶ 69-76.

sections 201(b) and 202(a) of the Act,<sup>24</sup> respectively, by refusing to enter into a written interconnection agreement with North County.<sup>25</sup> Count IV of the Complaint alleges that MetroPCS is violating rule 51.715<sup>26</sup> by refusing to enter into an interim interconnection agreement with North County.<sup>27</sup> The Complaint asks the Commission to issue an order (i) prescribing a rate for terminating intrastate traffic between the parties at or above the rate billed by North County to MetroPCS, and (ii) awarding North County past due amounts consistent with the Commission's prescribed intrastate termination rate, plus reasonable interest.<sup>28</sup>

### III. DISCUSSION

#### A. Count I of the Complaint is Dismissed Without Prejudice So That the California PUC May First Determine a Reasonable Compensation Rate.

8. Rule 20.11(b) provides, in pertinent part, that "[a] commercial mobile radio service provider shall pay *reasonable compensation* to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider."<sup>29</sup> Count I of the Complaint alleges that MetroPCS is violating that rule by failing to pay for North County's termination of intrastate traffic originated by MetroPCS.<sup>30</sup>

9. We decline to determine, in the first instance, what constitutes "reasonable compensation" in this case.<sup>31</sup> The Commission has repeatedly held that (i) states have authority under section 2(b) of the Act<sup>32</sup> to establish rates charged by LECs for termination of intrastate traffic from

---

<sup>24</sup> 47 U.S.C. § 201(b) (barring any "unjust and unreasonable" practice in connection with communication service), 202(a) (barring "unjust and unreasonable discrimination" by any carrier "in connection with like communication service").

<sup>25</sup> See, e.g., Complaint at 19-20, ¶¶ 77-86, 22-23, ¶¶ 95-103.

<sup>26</sup> 47 C.F.R. § 51.715(b) (providing, in pertinent part, that "an incumbent LEC must, without unreasonable delay, establish an interim arrangement for transport and termination of telecommunications traffic at symmetrical rates").

<sup>27</sup> See, e.g., Complaint at 20-22, ¶¶ 87-94.

<sup>28</sup> See, e.g., Complaint at 23-26, ¶¶ 104-119. MetroPCS filed several unopposed motions seeking judicial notice of a number of federal court and public utility commission submissions. See MetroPCS California, LLC's Motion for Judicial Notice, File No. EB-06-MD-007 (filed Apr. 6, 2007); MetroPCS California, LLC's Second Motion for Judicial Notice, File No. EB-06-MD-007 (filed May 16, 2007); MetroPCS California, LLC's Third Motion for Judicial Notice, File No. EB-06-MD-007 (filed Feb. 12, 2008) (collectively "Motions for Judicial Notice"). We hereby grant MetroPCS' Motions for Judicial Notice. The parties also filed other motions regarding the briefing in this case. See North County Communications Corp. Motion to Strike Portions of MetroPCS Brief in Opposition, File No. EB-06-MD-007 (filed Oct. 16, 2007); MetroPCS California, LLC Motion Requesting Supplemental Briefing, File No. EB-06-MD-007 (filed Nov. 17, 2008). We hereby deny those motions.

<sup>29</sup> 47 C.F.R. § 20.11(b)(2) (emphasis added).

<sup>30</sup> See, e.g., Complaint at 15-16, ¶¶ 64-68. For purposes of this Order only, we assume, without deciding, that a violation of rule 20.11 would be a violation of the Act cognizable under section 208 of the Act. See *Center for Communications Management Information v. AT&T Corporation*, Memorandum Opinion and Order, 23 FCC Rcd 12249, 12253 at ¶ 11, n.29 (2008); *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 127 S.Ct. 1513 (2007); *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001). See generally North County Initial Brief at 12-14; MetroPCS Initial Brief at 8-12.

<sup>31</sup> North County acknowledges that the Commission cannot adjudicate Count I of the Complaint without knowing what constitutes "reasonable compensation" for North County's termination of intrastate traffic originated by MetroPCS. See, e.g., Complaint at 23-26 (asking the Commission to prescribe a reasonable rate for North County's termination of intrastate traffic originated by MetroPCS).

<sup>32</sup> 47 U.S.C. § 152(b).

CMRS providers, and (ii) the Commission has not preempted such state authority.<sup>33</sup> Thus, the more appropriate venue for determining what constitutes “reasonable compensation” for North County’s termination of intrastate traffic originated by MetroPCS is not this Commission, but rather the California PUC, via whatever procedural mechanism it deems appropriate under state law (e.g., complaint proceeding, declaratory ruling proceeding, generic cost or rulemaking proceeding). In turn, unless and until what constitutes reasonable compensation for North County’s termination of intrastate traffic originated by MetroPCS is determined, the Commission cannot determine whether or to what extent MetroPCS has violated its duty under rule 20.11(b)(2) to pay such compensation. Accordingly, we dismiss without prejudice Count I of the Complaint. If after the California PUC prescribes a reasonable rate North County believes that MetroPCS has failed to pay what is owed pursuant to that rate under rule 20.11(b)(2), then North County may seek resolution of that dispute at that time.

10. In North County’s view, because rule 20.11(a) permits parties to file complaints under section 208 of the Act alleging violations of rule 20.11(b)(2), rule 20.11(a) implicitly requires the Commission to determine what a reasonable compensation rate under rule 20.11(b)(2) is in this complaint proceeding.<sup>34</sup> According to North County, “[a]n ability to adjudicate a refusal to pay compensation without an ability to adjudicate the rate is nonsensical.”<sup>35</sup> We disagree. Construing the Commission’s adjudicatory role under rule 20.11 as permitting states to determine in the first instance whether the

<sup>33</sup> *In the Matter of Developing a Unified Inter-carrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855, 4861 at ¶ 10 n.41 (2005) (“*T-Mobile Declaratory Ruling*”) (subsequent history omitted) (stating that “the Commission preempted state and local regulations governing the kind of interconnection to which CMRS providers are entitled, but it specifically declined to preempt state regulation of LEC intrastate interconnection rates applicable to CMRS providers”); *Airtouch Cellular v. Pacific Bell*, Memorandum Opinion and Order, 16 FCC Rcd 13502, 13507 at ¶ 14 (2001) (“*Airtouch v. Pacific Bell*”) (stating that the determination of the actual rates charged for intrastate LEC-CMRS interconnection is left to the states); *In the Matter of Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Notice of Proposed Rulemaking, 11 FCC Rcd 5020, 5072 at ¶ 109 (1996) (“*LEC-CMRS Interconnection NPRM*”) (subsequent history omitted) (stating that the Commission’s LEC-CMRS mutual compensation rules do not preclude the states from setting the actual interconnection rates that LECs and CMRS providers charge); *Equal Access and Interconnection Obligations Pertaining to CMRS*, Notice of Proposed Rulemaking and Notice of Inquiry, 9 FCC Rcd 5408, 5451 at ¶ 104 (1994) (“*CMRS Equal Access and Interconnection Obligations NPRM/NOI*”) (noting that the Commission has declined to preempt state regulation of LEC rates for intrastate interconnection with cellular carriers); *In the Matter of Implementation of Sections 3(N) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1498 at ¶¶ 231-232 (1994) (“*CMRS Second Report and Order*”) (subsequent history omitted) (adopting rule 20.11, but declining to preempt state regulation of LEC intrastate interconnection rates); *The Need To Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd 2369, 2372 at ¶ 25 (1989) (noting that compensation arrangements regarding intrastate traffic between landline telephone companies and cellular carriers are subject to state regulatory jurisdiction); *The Need To Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Declaratory Ruling, 2 FCC Rcd 2910, 2912 at ¶¶ 18, 2915 at ¶¶ 44-45 (1987) (noting that intrastate charges for cellular interconnection with landline carriers is subject to intrastate regulation); *Indianapolis Telephone Company v. Indiana Bell Telephone Company Inc.*, Memorandum Opinion and Order, 1 FCC Rcd 228, 229-30 at ¶ 10 (1986) (stating that financial arrangements between cellular and landline carriers regarding intrastate traffic fall within the purview of state regulatory authorities). See *Rural Iowa Independent Telephone Association v. Iowa Utilities Board*, 385 F.Supp.2d 797, 825 (S.D. Iowa 2005) (“*RIITA v. IUB*”), *aff’d*, 476 F.3d 572 (8<sup>th</sup> Cir. 2007) (holding that state commissions may arbitrate indirect interconnection agreements between LECs and CMRS carriers); *Iowa Network Services, Inc. v. Qwest Corporation*, 385 F.Supp.2d 850, 893 (S.D. Iowa 2005) (“*INS v. Qwest*”) (holding that state commissions may arbitrate indirect interconnection agreements between LECs and CMRS carriers).

<sup>34</sup> See, e.g., North County Initial Brief at 18-19 (citing 47 C.F.R. § 20.11(a), which provides, in pertinent part, that parties may file “[c]omplaints against carriers under section 208 of the Communications Act ... alleging a violation of this section....”).

<sup>35</sup> North County Initial Brief at 18.

charged rate is reasonable is perfectly consistent with the plain language of rule 20.11 and with the Commission's multiple orders – including the order adopting rules 20.11(a)-(b) – expressly declining to preempt state authority to establish intrastate rates charged by LECs to terminate traffic from CMRS providers.<sup>36</sup> Indeed, in an order inaptly relied upon by North County, the Commission squarely held that, “although LECs were required to pay mutual compensation to CMRS carriers [and vice-versa] for intrastate traffic pursuant to [rule 20.11] ..., the determination of the actual rates charged for intrastate interconnection would be left to the states.”<sup>37</sup> Thus, North County's interpretation of rule 20.11(a) is wrong.

11. MetroPCS argues that allowing the California PUC to establish a reasonable compensation rate for North County's termination of intrastate traffic would violate section 332(c)(3)(A) of the Act, which provides, in pertinent part, that “no State or local government shall have any authority to regulate the ... rates charged by any commercial mobile service....”<sup>38</sup> That position is not supported by Commission precedent. The rates charged by North County to MetroPCS for transport and termination are not “rates charged by any commercial mobile service” within the meaning of section 332(c)(3)(A) of the Act. The Commission has interpreted section 332(c)(3)(A) to prohibit States from “prescribing, setting or fixing” rates, and determined that the proscription extends to regulation of rate levels and structures for CMRS, including how much may be charged for CMRS.<sup>39</sup> Thus, the Commission has stated that this provision applies to retail charges to end users of CMRS, rather than to termination charges to other carriers associated with CMRS.<sup>40</sup> In other words, by explicitly declining to preempt state regulation of intrastate rates that LECs charge CMRS providers for termination after the passage of section 332(c)(3)(A) of the Act, the Commission has not applied section 332(c)(3)(A) to such intercarrier rates.<sup>41</sup> Therefore, allowing the California PUC to establish a reasonable compensation rate for North County's termination of intrastate traffic does not conflict with section 332(c)(3)(A) of the Act.

12. North County and MetroPCS also contend that allowing the California PUC to establish a reasonable compensation rate for North County's termination of intrastate traffic would conflict with the Commission's decision in its *T-Mobile Declaratory Ruling*, which permits incumbent LECs, but not CLECs, to invoke the state arbitration procedures of section 252 of the Act to reach interconnection agreements with CMRS carriers.<sup>42</sup> We disagree. The *T-Mobile Declaratory Ruling* expressly acknowledges the Commission's prior orders declining to preempt state regulation of intrastate rates that LECs charge CMRS providers for termination, and then does not alter or overrule those orders.<sup>43</sup> Moreover, the *T-Mobile Declaratory Ruling* addresses a carrier's power to invoke the state arbitration processes specifically authorized by section 252 of the Act, but does not purport to address a state's

---

<sup>36</sup> See n.33, *supra*. See also *T-Mobile Declaratory Ruling*, 20 FCC Rcd at 4867, ¶ 15 n.61 (stating that, “although CMRS providers may indeed have an existing legal obligation to compensate LECs for the termination of wireless traffic under section 20.11(b)(2) ..., the rules fail to specify the mechanism by which LECs may obtain this compensation”).

<sup>37</sup> *Airtouch v. Pacific Bell*, 16 FCC Rcd at 13507, ¶ 14 (emphasis added).

<sup>38</sup> 47 U.S.C. § 332(c)(3)(A). See MetroPCS Initial Brief at 13-16.

<sup>39</sup> See, e.g., *In the Matter of Truth-In-Billing and Billing Format*, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 6448, 6462-3 at ¶ 30 (2005).

<sup>40</sup> *Id.*

<sup>41</sup> See, e.g., *T-Mobile Declaratory Ruling*, 20 FCC Rcd at 4860-61, ¶ 10 n.41; *Airtouch v. Pacific Bell*, 16 FCC Rcd at 13507, ¶ 14 (2001); *LEC-CMRS Interconnection NPRM*, 11 FCC Rcd at 5072, ¶ 109; *CMRS Equal Access and Interconnection Obligations NPRM/NOI*, 9 FCC Rcd at 5451, ¶ 104; *CMRS Second Report and Order*, 9 FCC Rcd at 1498, ¶¶ 231-232. See also *RIITA v. IUB*, 385 F.Supp.2d at 825; *INS v. Qwest*, 385 F.Supp.2d at 893.

<sup>42</sup> See, e.g., North County Initial Brief at 14-17; MetroPCS Initial Brief at 17-18.

<sup>43</sup> See, e.g., *T-Mobile Declaratory Ruling*, 20 FCC Rcd at 4860-61, ¶ 10.

general authority to regulate rates for intrastate traffic as preserved by section 2(b) of the Act.<sup>44</sup> Therefore, allowing the California PUC to establish a reasonable compensation rate for North County's termination of intrastate traffic pursuant to its general authority to regulate intrastate traffic does not conflict with the *T-Mobile Declaratory Ruling*.<sup>45</sup>

13. MetroPCS further asserts that rule 20.11 does not apply at all to the traffic at issue here, because such traffic is not "telecommunications" under section 3(43) of the Act.<sup>46</sup> To support that assertion, MetroPCS observes that "telecommunications" only includes the transmission of information "between or among points *specified by the user*,"<sup>47</sup> and callers to chat lines do not specify the particular person(s) with whom he/she is going to communicate.<sup>48</sup> Even assuming that the obligation to pay reasonable compensation for termination of traffic under rule 20.11 only applies to traffic that meets the definition of "telecommunications" at section 3(43) of the Act, MetroPCS' assertion lacks merit.<sup>49</sup> The completion of calls from MetroPCS' customers to North County's customers is "transmission."<sup>50</sup> In addition, the chat line itself is sufficient to constitute the "point[] specified by the user" as used in the definition of "telecommunications."<sup>51</sup> Thus, the calls to chat lines at issue here satisfy the statutory definition of "telecommunications."<sup>52</sup>

---

<sup>44</sup> 47 U.S.C. § 152(b).

<sup>45</sup> According to North County, we should not assume that the California PUC will initiate a proceeding to establish a rate for termination of LEC/CMRS intrastate traffic because, since the release of the *T-Mobile Declaratory Ruling*, certain states have declined to arbitrate interconnection agreements between CLECs and CMRS carriers. North County Initial Brief at 14-16. Those decisions, however, only concern state arbitration of interconnection agreements under section 252 of the Act, not a state's general authority to regulate rates for intrastate traffic as preserved by section 2(b) of the Act.

<sup>46</sup> 47 U.S.C. § 153(43). See, e.g., Amended Answer at 4-7, ¶¶ 5, 8-10; MetroPCS Legal Analysis at 6-11; MetroPCS Initial Brief at 40-43; Reply of MetroPCS California, LLC to North County Communications Corp.'s Brief in Opposition to the Legal Brief of MetroPCS California, LLC, File No. EB-06-MD-007 at 11-13 (filed Oct. 26, 2007).

<sup>47</sup> 47 U.S.C. § 153(43) (emphasis added).

<sup>48</sup> See, e.g., MetroPCS Legal Analysis at 7, ¶ 10, 9-10, ¶¶ 12-13; MetroPCS Initial Brief at 41-42.

<sup>49</sup> We note that rule 20.11 does not use the term "telecommunications," and instead requires compensation for termination of "traffic"; moreover, the relevant provisions of rule 20.11 actually predate the adoption of the "telecommunications" definition at section 3(43) of the Act.

<sup>50</sup> See, e.g., *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7539 at ¶ 41 (2006).

<sup>51</sup> Moreover, MetroPCS appears to conflate multiple concepts, and does not demonstrate that the physical location of the parties calling into the chat line is relevant to the "telecommunications service" or "information service" classification of either the chat line service or the termination service. Nor does MetroPCS cite any precedent suggesting that the Commission has preempted the states' jurisdiction regarding intrastate traffic to chat lines. Indeed, recent precedent suggests the contrary. Cf. *Establishing Just and Reasonable Rates for Local Exchange Carriers*, Notice of Proposed Rulemaking, 22 FCC Rcd 17989, 17994-95 at ¶12 & n.40 (2007) (noting that "increased switched access traffic appears to be caused by the deployment of chat lines, conference bridges, or other similar high call volume operations in the service areas of certain rate-of-return or competitive LECs," and seeking comment regarding *interstate* calls to such numbers, while observing that "[i]ntrastate calls may also be made to these numbers, but those calls are beyond the jurisdiction of this Commission and thus are not the subject of this order").

<sup>52</sup> Although MetroPCS also asserts that, in *AT&T v. Jefferson*, the Commission referred to a LEC with end users who offered chat-line service as an "information provider," that assertion is both incorrect and irrelevant. See, e.g., MetroPCS Initial Brief at 40 (citing *AT&T Corp. v. Jefferson Telephone Co.*, Memorandum Opinion and Order, 16 FCC Rcd 16130, 16131 at ¶ 2 (2001)). *AT&T v. Jefferson* refers to the LEC's *customer* – not to the LEC itself – as an "information provider," and in any event, *AT&T v. Jefferson* does not discuss at all the statutory definitions of "telecommunications" and "information service." 47 U.S.C. §§ 153(43), 153(20). Moreover, by definition,

(continued ...)

14. Finally, MetroPCS proffers several policy arguments why, despite past Commission rulings to the contrary, we should effectively preempt the California PUC's authority to regulate North County's intrastate termination rates as applied to CMRS carriers.<sup>53</sup> Without commenting one way or another on the merits of MetroPCS's policy arguments, we decline MetroPCS's suggestion to preempt such state authority in the context of this complaint proceeding. Whether to depart so substantially from such long-standing and significant Commission precedent is a complex question better suited to a more general rulemaking proceeding.<sup>54</sup>

15. For the foregoing reasons, we conclude that the California PUC is the more appropriate venue for determining a reasonable termination rate. Accordingly, we dismiss without prejudice the claim in Count I of the Complaint that MetroPCS is violating rule 20.11 by failing to pay for North County's termination of intrastate traffic originated by MetroPCS.<sup>55</sup>

**B. We Deny Counts II and IV of the Complaint, Because Section 251(b)(5) of the Act and Sections 51.301 and 51.715 of the Commission Rules Do Not Apply to MetroPCS.**

16. Count II of the Complaint alleges that MetroPCS is violating section 251(b)(5) of the Act by failing to negotiate and enter into a written reciprocal compensation arrangement with North County.<sup>56</sup> Section 251(b)(5) imposes a duty to establish reciprocal compensation only upon LECs.<sup>57</sup> Moreover, the Commission has stated unequivocally that "CMRS providers will not be classified as LECs and are not subject to the obligations of section 251(b)."<sup>58</sup> Therefore, as a CMRS provider, MetroPCS is not subject

---

(Continued from previous page)

information services are provided "via telecommunications." 47 U.S.C. § 153(20). Thus, *AT&T v. Jefferson* is inapposite here.

<sup>53</sup> See, e.g., MetroPCS Initial Brief at 18-21.

<sup>54</sup> See, e.g., *In the Matter of Developing a Unified Inter-carrier Compensation Regime*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 2008 WL 4821547 (2008); *In the Matter of Developing a Unified Inter-carrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 (2005); *In the Matter of Developing a Unified Inter-carrier Compensation Regime*, Comment Sought on Missoula Inter-carrier Compensation Reform Plan, 20 FCC Rcd 4855 (2005); *In the Matter of Developing a Unified Inter-carrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001). MetroPCS points out that no Commission order or court decision precludes the Commission from changing course and deciding to preempt state authority over the termination rates that LECs charge CMRS providers for intrastate traffic. MetroPCS Initial Brief at 21-23. That may be true, but we decline to take such action in this complaint proceeding.

<sup>55</sup> We make no determinations at this time as to whether rule 20.11 imposes obligations to pay compensation in the absence of an agreement, and if so, on what terms, or alternatively, whether the obligation under rule 20.11 is a mandate that the parties must enter into an agreement to a reasonable rate of mutual compensation. In either case, we find that resolution of the rule 20.11 claim depends first on the establishment of a reasonable rate. We note, however, that due to the language of rule 20.11, claims regarding the non-payment of an established interconnection rate would not run afoul of our "collection action" prohibition. See, e.g., *Contel of the South, Inc. v. Operator Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 548, 551 at ¶ 7 (2008) (explaining that actions to enforce compensation obligations explicitly imposed by our rules may be brought to the Commission).

<sup>56</sup> See, e.g., Complaint at 16-18, ¶¶ 69-76; North County Legal Analysis at 9-12; North County Communications Corp.'s Legal Analysis Replying to MetroPCS California, LLC's Answer, File No. EB-06-MD-007 at 10-13 (filed Oct. 25, 2006) ("North County Reply Legal Analysis").

<sup>57</sup> 47 U.S.C. § 251(b)(5).

<sup>58</sup> *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15996, at ¶ 1005 (1996) (subsequent history omitted). *Accord T-Mobile Declaratory Ruling*, 20 FCC Rcd at 4864, ¶ 16 (stating that "section 251(b)(5) requires LECs to enter into reciprocal compensation agreements with all CMRS providers but [ ] does not explicitly impose reciprocal compensation obligations on CMRS providers").

to the obligations arising directly from section 251(b) itself. Accordingly, we deny North County's claim in Count II of the Complaint that MetroPCS is violating section 251(b)(5) of the Act.

17. Counts II and IV of the Complaint also allege that MetroPCS is violating sections 51.301 and 51.715 of the Commission's rules<sup>59</sup> by refusing to negotiate or execute in good faith either an interim or a final rate for the transport and termination of intrastate telecommunications traffic.<sup>60</sup> To support these allegations, North County argues that rules 51.301 and 51.715 apply to CMRS providers such as MetroPCS by virtue of rule 20.11(c), which provides, in pertinent part, that "[l]ocal exchange carriers and commercial mobile radio service providers shall also comply with applicable provisions of part 51" of the Commission's rules.<sup>61</sup>

18. We reject North County's assertion that rule 20.11(c) expands the scope of rules 51.301 and 51.715 to reach CMRS providers such as MetroPCS. Under rule 20.11(c), CMRS providers must comply only with "*applicable*" provisions of part 51.<sup>62</sup> Rules 51.301 and 51.715 apply to negotiations between an incumbent LEC and a requesting telecommunications carrier.<sup>63</sup> Because neither MetroPCS nor North County is an incumbent LEC, rules 51.301 and 51.715 are not "*applicable*" provisions of part 51 within the meaning of rule 20.11(c). Thus, North County has failed to state a claim under rules 51.301 and 51.715.<sup>64</sup> Accordingly, we deny North County's claim in Count II of the Complaint that MetroPCS is violating rule 51.301, and we deny North County's claim in Count IV of the Complaint that MetroPCS is violating rule 51.715.<sup>65</sup>

**C. We Deny Count III of the Complaint, Because MetroPCS' Failure to Negotiate an Interconnection Agreement With North County Does Not Violate Section 201(b) of the Act.**

19. Count III of the Complaint alleges that MetroPCS' refusal to enter into an interconnection agreement with North County to pay for terminating intrastate traffic constitutes an unjust and unreasonable practice under section 201(b) of the Act.<sup>66</sup> Specifically, North County alleges that

---

<sup>59</sup> 47 C.F.R. §§ 51.301, 51.715.

<sup>60</sup> Complaint at 16-18, ¶¶ 69-76; 20-21, ¶¶ 87-93; North County Legal Analysis at 9-14; North County Reply Legal Analysis at 15-16; North County Initial Brief at 42-47; North County Communications Corp.'s Brief in Opposition to the Legal Brief of MetroPCS California, LLC, File No. EB-06-MD-007 at 29-30 (filed Oct. 15, 2007) ("North County Opposition Brief"); Reply Brief of North County Communications Corp. to the Opposition of MetroPCS California, LLC, File No. EB-06-MD-007 at 14-15 (filed Oct. 26, 2007) ("North County Reply Brief").

<sup>61</sup> 47 C.F.R. § 20.11(c).

<sup>62</sup> 47 C.F.R. § 20.11(c) (emphasis added).

<sup>63</sup> 47 C.F.R. § 51.301(a) (providing that "[a]n incumbent LEC shall negotiate in good faith ... the duties established by sections 251(b) and (c) of the Act"); 51.715(b) (providing that "an incumbent LEC must, without unreasonable delay, establish an interim arrangement for transport and termination of telecommunications traffic at symmetrical rates"). Moreover, rule 51.301 appears in Subpart D of Part 51, which is entitled "Additional Obligations of Incumbent Local Exchange Carriers."

<sup>64</sup> In any event, a careful review of the record reveals no failure by MetroPCS to negotiate in good faith. The parties' inability to reach either an interim or a final interconnection agreement stemmed not from any misconduct, but rather from an honest disagreement about what constitutes a reasonable termination rate under the specific facts and applicable law here. See, e.g., Joint Statement at 2-20. See also Part III(C), *infra*.

<sup>65</sup> For purposes of this Order only, we assume, without deciding, that a violation of either rule 51.301 or rule 51.715 would be a violation of the Act cognizable under section 208 of the Act. See n.30, *supra*.

<sup>66</sup> See, e.g., Complaint at 19-20, ¶¶ 77-86; North County Legal Analysis at 12-13; North County Reply Legal Analysis at 13-15. See also 47 U.S.C. § 201(b) (barring any "unjust or unreasonable" practice in connection with communication service).

MetroPCS is “unreasonably delay[ing] negotiation of an interconnection agreement in order to avoid paying termination services as long as possible.”<sup>67</sup> In particular, North County alleges that MetroPCS is “making unsupported allegations that it is entitled to free termination until such time as the parties enter an interconnection agreement.”<sup>68</sup> In addition, North County alleges that, during the parties’ negotiations, MetroPCS refused to substantiate alleged discrepancies in North County’s billed minutes of use and MetroPCS’ measured minutes of use.<sup>69</sup> North County also maintains that MetroPCS has continued to send traffic to North County each month even though North County has requested that MetroPCS stop doing so.<sup>70</sup> North County argues that these facts, viewed in their totality, demonstrate that MetroPCS has violated section 201(b) of the Act by unreasonably delaying negotiation of an interconnection agreement to avoid paying for intrastate termination services as long as possible.<sup>71</sup>

20. Based on our careful review of the entire record, we conclude that North County has failed to prove by a preponderance of the evidence that the parties’ inability to reach an agreement regarding termination of intrastate traffic stems from unreasonable conduct by MetroPCS.<sup>72</sup> Rather, the record clearly demonstrates that the parties’ inability to reach an agreement regarding termination of intrastate traffic stems from irreconcilable but *honestly* held beliefs regarding the compensation rate, which, in turn, stem from *good faith* disagreements.<sup>73</sup> These *bona fide* disputes – and not any illegitimate posturing by MetroPCS (or North County) – are what ultimately precluded the parties from reaching an agreement.<sup>74</sup> Therefore, we deny the claim in Count III of the Complaint that MetroPCS is violating section 201(b) of the Act by failing to enter into an agreement to pay for North County’s termination of

<sup>67</sup> Complaint at 20, ¶ 84. See, e.g., North County Legal Analysis at 11-12; North County Initial Brief at 42-47; North County Opposition Brief at 29-30.

<sup>68</sup> Complaint at 20, ¶ 82. See, e.g., North County Reply Legal Analysis at 13-16.

<sup>69</sup> See, e.g., Complaint at 20, ¶ 83; North County Reply Legal Analysis at 13; North County Initial Brief at 10, 43-44; North County Reply Brief at 14-15.

<sup>70</sup> See, e.g., Joint Statement at 5, ¶ 29, 7, ¶ 38, 9, ¶ 46.

<sup>71</sup> See, e.g., Complaint at 19-20, ¶¶ 77-86; North County Legal Analysis at 12-13; North County Reply Legal Analysis at 13-15.

<sup>72</sup> For purposes of this Order only, we assume, without deciding, that a CMRS carrier’s failure to enter in good faith into an agreement with a CLEC regarding the termination of intrastate traffic, and a failure to pay a CLEC for such termination, could constitute a violation of section 201(b) of the Act. See n.30, *supra*. We further assume, *arguendo*, that section 201(b), which on its face is limited in application to “charges, practices, classifications, and regulations for and in connection with [interstate or foreign communication],” nevertheless applies to the intrastate traffic at issue.

<sup>73</sup> These disagreements involved, *inter alia*, (i) whether the parties have, or should be deemed to have, a default bill-and-keep arrangement; (ii) whether the one-way nature of the intrastate traffic involved renders an analogy to “ISP-bound traffic” dispositive; (iii) whether and to what extent the rates the parties charge and pay other carriers for terminating intrastate traffic are dispositive; (iv) whether North County’s failure to provide cost information is dispositive; (v) whether and to what extent the applicable statute of limitations bars North County’s claims; (vi) whether any rate prescription could be prospective only; (vii) whether the California PUC has adopted a relevant traffic termination rate; and (viii) whether sections 202(a) and 252(b)(5) of the Act and sections 51.301 and 51.715 of the Commission’s rules apply to MetroPCS in this context. See, e.g., Complaint at 4-14, ¶¶ 21-58, 16-20, ¶¶ 69-86; North County Legal Analysis at 9-13; Amended Answer at 12-32, ¶¶ 21-58, 38-49, ¶¶ 69-86, 67, ¶ 6, 69, ¶ 10; MetroPCS Legal Analysis at 17-30; Reply of North County Communications Corp. to MetroPCS California, LLC’s Amended Answer, File No. EB-06-MD-007 at 19-26, ¶¶ 69-86 (filed Oct.25, 2007); North County Reply Legal Analysis at 8-15; North County Initial Brief at 42-47; North County Opposition Brief at 29; Opposition of MetroPCS California, LLC to Legal Brief of North County Communications Corporation, File No. EB-06-MD-007 at 22-28 (filed Oct. 15, 2007); North County Reply Brief at 14-15.

<sup>74</sup> We note that both parties contributed to lengthening the duration of this dispute by disregarding the Commission’s clear and repeated statements that state commissions, and not this Commission, are the appropriate fora for establishing a LEC’s intrastate termination rates. See Part III (A), *supra*.

intrastate traffic.<sup>75</sup>

**D. We Deny Count V of the Complaint, Because MetroPCS Has Not Violated Section 202(a) of the Act.**

21. Count V of the Complaint alleges that MetroPCS' "refusal to enter into an interconnection agreement that provides a comparable rate for like termination services constitutes unjust and unreasonable discrimination" under section 202(a) of the Act.<sup>76</sup> Specifically, North County contends that MetroPCS has negotiated and paid reasonable termination rates for intrastate traffic with other carriers, but refuses to do so with respect to North County.<sup>77</sup> North County asserts that this conduct violates the non-discrimination requirement of section 202(a) of the Act.<sup>78</sup>

22. We disagree. Section 202(a) is inapplicable where, as here, the challenged conduct – refusing to pay “a comparable rate for [allegedly] like termination services” – is that of the carrier receiving the communication service rather than the carrier providing the service. Notably, North County does not base its section 202(a) claim on services provided by MetroPCS at all, but on alleged similarities between North County's own termination services and the termination services of other carriers. As the Commission has explained, however, “[s]ection 202(a) is not concerned with whether the services of two *separate* carriers are ‘like’; it is concerned with whether two services offered by the *same* carrier are like.”<sup>79</sup> There is no dispute that North County, not MetroPCS, is the carrier providing the communication service in question here. Thus, MetroPCS' willingness or obligation to pay other carriers a different rate for terminating intrastate traffic than what it is willing to pay North County for terminating services does not fall within the scope of section 202(a) of the Act.<sup>80</sup>

23. In sum, North County has failed to state a claim under section 202(a) of the Act. Accordingly, we deny North County's claim in Count V of the Complaint that MetroPCS is violating section 202(a) of the Act.

**E. We Deny MetroPCS' Motion for Sanctions.**

24. MetroPCS requests that the Commission impose sanctions against North County for an

<sup>75</sup> To the extent that Count III is based on MetroPCS' failure to pay North County for terminating intrastate traffic, separate and distinct from MetroPCS' failure to execute an agreement for such payment, Count III is dismissed for the reasons explained in Part III (A), *supra*.

<sup>76</sup> Complaint at 23, ¶ 101. *See, e.g.*, Complaint at 22-23, ¶¶ 95-103; North County Legal Analysis at 15-18; North County Reply Legal Analysis at 17-19. *See also* 47 U.S.C. § 202(a) (providing that “[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service ...”).

<sup>77</sup> *See, e.g.*, Complaint at 22-23, ¶¶ 95-103; North County Legal Analysis at 14-15; North County Reply Legal Analysis at 18.

<sup>78</sup> *See, e.g.*, Complaint at 23, ¶ 102; North County Legal Analysis at 15; North County Reply Legal Analysis at 19.

<sup>79</sup> *CoreComm Communications, Inc. and Z-Tel Communications, Inc. v. SBC Communications Inc.*, Memorandum Opinion and Order, 18 FCC Red 7568, 7582, at ¶ 34 (2003) (emphasis in original) (footnote omitted), *vacated on other grounds*, *SBC Communications, Inc. v. FCC*, 407 F.3d 1223 (D.C. Cir. 2005). *See, e.g.*, *Competitive Telecommunications Ass'n v. FCC*, 998 F.2d 1058, 1064 (D.C. Cir. 1993) (“Section 202(a) is designed to prevent a carrier from granting a discount to one (usually large) user that it would not grant were the same or a ‘like’ service purchased by another (usually small) customer.”); *Reservation Telephone Cooperative v. AT&T*, 59 Rad. Reg. 2d 484 at ¶ 33 (1985) (stating that section 202 “was derived from Interstate Commerce Act provisions that were designed primarily for the protection of customers of common carrier services”).

<sup>80</sup> Because section 202(a) clearly does not apply in the manner alleged by North County, we need not, and do not, decide whether section 202(a) could apply to a CMRS carrier's provision of service in connection with intrastate traffic. *See* n.30 and n.72, *supra*.

alleged violation of the Commission's *ex parte* rules.<sup>81</sup> Specifically, MetroPCS seeks sanctions because North County allegedly violated the Commission's *ex parte* rules by soliciting a prohibited *ex parte* presentation by Congressman Bob Filner. North County has opposed the request.<sup>82</sup>

25. Congressman Filner's November 17, 2008 letter to Commissioner McDowell supported North County's attempts to meet with Commission staff to expedite resolution of this proceeding and, in doing so, also characterized the matters at issue in this proceeding in a manner that can be construed as favorable to North County.<sup>83</sup> The letter contained no indication that it was served on MetroPCS. It was, however, put into the record and served on MetroPCS by North County on November 21, 2008 as an attachment to a pleading.<sup>84</sup> Because this proceeding is classified as restricted under the *ex parte* rules,<sup>85</sup> we find that Congressman Filner's letter is a prohibited *ex parte* presentation.<sup>86</sup> We reject North County's contention that the letter should be deemed a status inquiry that would be permissible under the *ex parte* rules, rather than a prohibited presentation.<sup>87</sup>

26. The Commission's *ex parte* rules prohibit the solicitation of improper presentations.<sup>88</sup> We find, however, that even if North County solicited Congressman Filner's letter, there is no justification for imposing any sanction against North County, other than an admonition to comply with the *ex parte* rules in the future. The circumstances do not suggest either that North County sought to conceal Congressman Filner's communication with the Commission or that MetroPCS was prejudiced by the *ex parte* nature of Congressman Filner's letter. North County has shown a general awareness of and willingness to comply with the *ex parte* rules by copying MetroPCS on its e-mail traffic regarding its

---

<sup>81</sup> See MetroPCS California LLC's Motion Requesting Sanctions Against North County Communications Corporation, File No. EB-06-MD-007 (filed Dec. 11, 2008) ("Motion for Sanctions").

<sup>82</sup> North County Communications Corporation's Opposition to MetroPCS California, LLC's Motion Requesting Sanctions, File No. EB-06-MD-007 (filed Dec. 18, 2008).

<sup>83</sup> See North County Communications Corporation's Opposition to MetroPCS California, LLC's Motion Requesting Supplemental Briefing, File No. EB-06-MD-007 (filed Nov. 21, 2008), Exhibit A, Declaration of Todd Lesser at Attachment 1 (Letter from Bob Filner, Member of Congress to the Honorable Robert M. McDowell dated November 17, 2008). The letter stated, for example: "[North County] has been pursuing an FCC enforcement action against a regional wireless carrier, MetroPCS, for refusing to pay North County Communications for use of its network *as the FCC's rules require*." *Id.* at 1 (emphasis added).

<sup>84</sup> *Id.*

<sup>85</sup> Formal complaints are made restricted by 47 C.F.R. §§ 1.1202(d)(2) (stating that parties to a formal complaint are parties to a proceeding for purposes of the *ex parte* rules) and 1.1208 (stating that proceedings not otherwise designated are restricted). *Ex parte* presentations to and from Commission decision-makers are prohibited in restricted proceedings. See 47 C.F.R. § 1.1208.

<sup>86</sup> The resolution of this issue was made in consultation with the Commission's Office of General Counsel, in accordance with 47 C.F.R. § 0.251(g). See Letter from David Senzel, Attorney-Advisor, Office of General Counsel, FCC, to Marlene H. Dortch, Secretary, FCC, File No. EB-06-MD-007 (filed Mar. 6, 2009) ("Senzel Letter"), attaching Letter from Joel Kaufman, Associate General Counsel to the Honorable Bob Filner (Feb. 5, 2009) (concluding the Congressman Filner's letter is a prohibited *ex parte* presentation). A presentation is a communication directed to the merits or outcome of a proceeding, but does not include inquiries relating solely to the status of a proceeding. See 47 C.F.R. § 1.1202(a). A written presentation not served on the parties to the proceeding is an *ex parte* presentation. See 47 C.F.R. § 1.1202(b).

<sup>87</sup> A status inquiry made on an *ex parte* basis, unlike an *ex parte* presentation, is permissible. However, a status inquiry is a prohibited presentation if it states or implies a view as to the merits or outcome of the proceeding or a preference for a particular party, states why timing is important to a particular party or indicates a view as to the date by which a proceeding should be resolved. See 47 C.F.R. § 1.1202(a). Congressman Filner's letter both states why timing is important to North County and appears to express a view as to the merits.

<sup>88</sup> 47 C.F.R. § 1.1210 (providing that "[n]o person shall solicit or encourage others to make any improper presentation ...").

desire to meet with Commission staff.<sup>89</sup> Moreover, only four days after Congressman Filner's letter, and before MetroPCS complained of an *ex parte* violation, North County served a copy of the letter on MetroPCS as an attachment to a pleading.<sup>90</sup> These facts readily distinguish this case from prior cases in which the Commission imposed sanctions for more egregious violations.<sup>91</sup>

27. As a related matter, we see no basis to find that Congressman Filner's letter represents improper intrusion into the Commission's adjudicative process. The Commission has recognized that certain intrusions by Congress into administrative decision-making may deprive parties of due process.<sup>92</sup> An evaluation of whether such improper intrusion has occurred turns on two factors: (1) whether there is an appearance of bias, and (2) whether congressional pressure actually affected the outcome.<sup>93</sup> In this regard, the analysis focuses on whether congressional influence shaped the agency's decision on the merits.<sup>94</sup> Simply stating a Member of Congress' views on the merits without a showing that the communication biased the agency's decision does not constitute improper influence.<sup>95</sup>

28. We do not believe that our decision on the merits above can be seen as affected by the contents of Congressman Filner's letter. First, Congressman Filner's letter presented a viewpoint on the merits almost as an aside to his views on timing. More importantly, the record supports, and this Order

---

<sup>89</sup> For example, a North County e-mail states: "As with all of our correspondence, I have copied Carl Northrop, who represents MetroPCS in this proceeding." The subject line of the e-mail reads: "North County v. MetroPCS, EB-06-MD-007 (RESTRICTED PROCEEDING)." Senzel Letter, attaching E-mail from Michael Hazzard to Matthew Berry and Joseph Palmore (Nov. 19, 2008).

<sup>90</sup> See *Elliott J. Greenwald, Esq.*, Letter, 13 FCC Rcd 7132, 7134-35 (OGC 1998) (finding no significant *ex parte* violation where party's failure to ensure timely service of congressional presentations did not reflect an intent to deprive opposing party of fair notice of the presentations); *Power Authority of the State of New York v. FERC*, 743 F.2d 93, 110 (2d Cir. 1984) (stating that, in evaluating an *ex parte* violation, one must look particularly to whether the communications contain factual matter or other information outside the record, which the parties did not have an opportunity to rebut). North County filed the Filner letter on November 21, 2008. See n.83, *supra*. MetroPCS first raised the *ex parte* issue on November 25, 2008. See Letter from Carl W. Northrop, Counsel for MetroPCS, to Matthew Berry, Office of General Counsel, File No. EB-06-MD-007 (filed Nov. 25, 2008).

<sup>91</sup> See, e.g., *Desert Empire Television Corp.*, Memorandum Opinion and Order, 88 FCC 2d 1413 (1982) (imposing a \$6,000 forfeiture against a party that repeatedly violated the *ex parte* rules despite being admonished to comply with the rules and promising compliance); *Elkhart Telephone Co.*, Notice of Apparent Liability and Forfeiture, 11 FCC Rcd 1165 (1995) (imposing a \$5,000 forfeiture on party sending a letter plainly attempting to solicit a communication that would violate the *ex parte* rules, and subsequently mischaracterized its efforts to the Commission).

<sup>92</sup> See *Elliott J. Greenwald, Esq.*, 13 FCC Rcd at 7135, citing *Pillsbury Co. v. FTC*, 354 F.2d 952, 963-65 (5th Cir. 1966).

<sup>93</sup> See *ATX, Inc. v. U.S. Dep't of Transportation*, 41 F.3d 1522, 1527 (D.C. Cir. 1994).

<sup>94</sup> See *id.* at 1528 (finding unobjectionable congressional pressure that may have prompted agency to hold hearing resulting in the denial of an application, where there was no reason to doubt that hearing was fair and impartial). See also *Elliott J. Greenwald, Esq.*, 13 FCC Rcd at 7135 (finding unobjectionable congressional interest that may have prompted FCC to accelerate its deliberations, where congressional letters focused on timing, not the merits). Thus, even if Congressman Filner's letter might have been a factor in the decision of Commission staff to meet with North County or to accelerate deliberations in this proceeding, that would not be the type of influence that the courts have found to be a violation of due process.

<sup>95</sup> See *ATX*, 41 F.3d at 1528. In *ATX*, a case in which members of Congress explicitly urged denial of an application, the court nevertheless found the agency's decision denying the application was free of bias. The court noted that the final decision-maker, who was aware of congressional letters, had insulated his decision-making from congressional interference in that he issued a lengthy opinion based on the record and that the basis of the decision was clear, open to scrutiny, and fully supported by the record. The court also noted that the final decision-maker did not reverse the decision reached by the ALJ after the hearing, and that the case was not a close one. If the decision-maker had suddenly reversed course or the case was a close one, the court stated that it might have found influence.

reaches, an outcome different from the one apparently advocated by Congressman Filner.<sup>96</sup> Thus, we deny MetroPCS' Motion for Sanctions.

#### IV. ORDERING CLAUSES

29. IT IS ORDERED, pursuant to sections 4(i), 4(j), 201, 208, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 208, and 332, and sections 1.721-1.736, 20.11, and 51.711 of the Commission's rules, 47 C.F.R. §§ 1.721-1.736, 20.11, and 51.711, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that Count I of the Complaint is DISMISSED WITHOUT PREJUDICE.

30. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 201, 202, 208, 251(b)(5), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 202, 208, 251(b)(5), and 332, and sections 1.721-1.736, 51.301 and 51.715 of the Commission's rules, 47 C.F.R. §§ 1.721-1.736, 51.301, and 51.715, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that Counts II, III, IV and V of the Complaint are DENIED.

31. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and sections 1.721-1.736 of the Commission's rules, 47 C.F.R. §§ 1.721-1.736, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that MetroPCS California, LLC's Motions for Judicial Notice are GRANTED.

32. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and sections 1.721-1.736 of the Commission's rules, 47 C.F.R. §§ 1.721-1.736, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that North County Communications Corp.'s Motion to Strike Portions of MetroPCS' Brief in Opposition, MetroPCS California, LLC's Motion Requesting Supplemental Briefing, and MetroPCS California, LLC's Motion Requesting Sanctions Against North County are DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith  
Chief, Enforcement Bureau

---

<sup>96</sup> The record also reflects that Congressman Filner contacted two House subcommittee chairmen and sought hearings on Commission enforcement processes. Motion for Sanctions, Exhibits 2 & 3 (letters from Congressman Filner dated November 17, 2008 to Congressman Edward J. Markey, Chairman, Committee on Commerce and Energy, Subcommittee on Telecommunications/Internet and Congressman Bart Stupak, Chairman, Committee on Commerce and Energy, Subcommittee on Oversight and Investigations). However, there is no indication that this resulted in any further contact with the Commission. Accordingly, Congressman Filner's communications with his House colleagues did not violate the *ex parte* rules and does not represent improper congressional intrusion into the Commission's adjudicative process.